(1)

Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

THE HOLY LAND FOUNDATION FOR
RELIEF AND DEVELOPMENT,
Petitioner,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States; the UNITED STATES DEPARTMENT OF JUSTICE; JOHN W. SNOW, in his official capacity as Secretary of the Treasury of the United States; the UNITED STATES DEPARTMENT OF THE TREASURY; COLIN L. POWELL, in his official capacity as Secretary of State of the United States; and the UNITED STATES DEPARTMENT OF STATE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the government's asserted interest in national security permit a court to grant summary judgment for the government on constitutional claims without allowing the plaintiff to conduct discovery, without crediting plaintiff's sworn declarations, and relying entirely on unsworn hearsay evidence?

2. Does it violate due process for a court to adjudicate a plaintiff's constitutional claims against the government on the basis of secret evidence that the government refuses to disclose to plaintiff or its counsel?

3. Did the government violate petitioner's right to due process by designating petitioner a terrorist organization, seizing all of petitioner's assets, and putting petitioner out of business, without granting petitioner an evidentiary hearing before an impartial factfinder, and on the basis, in part, of secret evidence that the government refuses to disclose to plaintiff or its counsel?

4. Whether the phrase "any property in which any foreign country or a national thereof has an interest" in the International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1)(B), requires that the "foreign country" or "national thereof" have a legally cognizable right to the property?

CORPORATE DISCLOSURE STATEMENT

In accordance with Sup. Ct. R. 29.6, petitioner Holy Land Foundation for Relief and Development ("HLF") states that it is a non-profit corporation organized under the laws of California. HLF engages in charitable activities. It has no parent companies, no stock, and no stockholders. No publicly held company has any ownership interest in HLF.

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PETITION FOR A WRIT OF CERTIORARI

The Holy Land Foundation for Relief and Development ("HLF") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-20) is reported at 333 F.3d 156. The court's denials of rehearing and rehearing en banc (App. 76-77) are unreported. The opinion of the district court (App. 23-75) is reported at 219 F. Supp. 2d 57.[1/]

JURISDICTION

The court of appeals entered judgment on June 20, 2003. App. 21. The court denied a timely petition for rehearing and for rehearing en banc on August 22, 2003. App. 76-77. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

U.S. Const. Amend. V provides in relevant part:

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law . . . .

[1/] Citations to "App." are to the Appendix to this Petition. Citations to "JA" are to the Joint Appendix filed in the court of appeals. Citations to "AR" are to the administrative record that the government filed in the district court.

50 U.S.C. § 1702(a)(1)(B) provides:

> At the times and to the extent specified in section 202, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise . . . investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States . . . .

Fed. R. Civ. P. 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 56 provides in relevant part:

> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is

sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by

affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

INTRODUCTION

Almost two years ago, the government branded HLF a terrorist organization, seized its assets, and put it out of business. To this day, no court has required the government to present a single live witness or sworn statement supporting its contention that HLF--once this nation's largest Muslim charity--funds the terrorist group Hamas. HLF has never had an opportunity to confront or cross-examine a single government witness. The government and the courts have relied on secret evidence that HLF has never been permitted to review. The government and the courts have ignored HLF's sworn declarations denying that it supports Hamas. Relying solely on hearsay, the courts have upheld the government's action and rejected HLF's constitutional claims challenging that action. HLF has never been permitted to obtain discovery in support of its claims. In short, the courts have jettisoned the ordinary principles of due process to uphold the government's summary and draconian action--action that, if directed against the American Red Cross, or the Salvation Army, or any "mainstream" American charity, would provoke cries of outrage from all corners of our society and swift redress from the courts.

The courts have sanctioned the government's extraordinary steps against HLF based on an asserted interest in national security. At one level, the government's national security interest cannot be doubted. No one would dispute the importance of cutting off financing for terrorists, including Hamas. But HLF has consistently denied that it supports Hamas. The government has

never explained how national security requires that HLF, despite its sworn assertions of innocence, must be branded a terrorist, stripped of its assets, and put out of business *without the procedural protections that any other litigant would receive.*

The government's claim of national security must be considered in light of a history of similar claims that have proven exaggerated. To cite a few notorious examples, the Executive Branch overstated the danger presented by Americans of Japanese descent during World War II, leading this Court to uphold orders restricting their liberty. *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). More than forty years passed before the injustice was corrected. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (granting coram nobis relief because Executive Branch misled courts about military necessity for restrictions); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (same). The government argued in 1971 that disclosure of the Pentagon Papers would cause grave damage to national security. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). The *New York Times* published the Papers, and there is no evidence that national security suffered in the slightest. In December 1999, the government made strident national security claims to convince a federal court to imprison Dr. Wen Ho Lee under extraordinarily strict conditions for nine months. *See United States v. Lee*, 79 F. Supp. 2d 1280 (D.N.M. 1999), *aff'd mem.*, 208 F.3d 228 (10th Cir. 2000). In September 2000, Dr. Lee regained his freedom. There is no evidence that his release damaged national security.

These examples share several common features: in each case, the government invoked national security to convince a court to depart from constitutional standards; in each case, courts initially acceded to the government's national security claims; and in each case, the government's purported concerns proved grossly

exaggerated. As the Fourth Circuit has observed in the First Amendment context:

> History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post Co., 807 F.2d 383, 391-92 (4th Cir. 1986). We urge the Court to grant certiorari to determine, in the context of the questions presented, whether the government's assertion of national security permits it to seize and close an American charity, and the courts to uphold those actions against the charity's constitutional claims, without affording the basic procedural protections that the Constitution and the Federal Rules of Civil Procedure would otherwise require.

STATEMENT OF THE CASE

On December 3, 2001, without notice or a hearing, the Department of Treasury ("DOT") designated HLF a terrorist organization under the purported authority of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1702(a)(1)(B), and associated Executive Orders. On December 4, the DOT Office of Foreign Assets Control ("OFAC") issued a blocking notice for HLF's assets. JA606. The designation and blocking notice rested on the theory that HLF provided funding for the terrorist group Hamas. Acting under the blocking notice, government agents entered HLF's offices in Texas, New Jersey, Illinois, and California, seized and removed the contents, and froze

HLF's bank accounts, which contained millions of dollars in charitable contributions.

On March 8, 2002, HLF filed a complaint in the United States District Court for the District of Columbia challenging its designation as a terrorist organization and the seizure of its assets. Among other claims, the complaint alleged that the government's actions had violated HLF's First Amendment rights to freedom of association and speech; its Fourth Amendment right to be free from unreasonable searches and seizures; its Fifth Amendment right to procedural due process; its right to free exercise of religion under the Religious Freedom Restoration Act ("RFRA"); and its rights under the Administrative Procedures Act. JA1-23.

On April 5, HLF moved for a preliminary injunction, with supporting exhibits. The exhibits included sworn declarations from (among others) Shukri Baker, HLF's chief executive officer; Dalell Mohmed, HLF's director of emergency relief; and Mohammed Abumoharram, the manager of HLF's Gaza office. JA522-81. Each declaration specifically denied that HLF had funded Hamas. Apart from the Baker, Mohmed, and Abumoharram declarations, HLF submitted additional declarations and other evidence explaining its charitable operations and rebutting the government's claim that it supports Hamas. JA582-883, 894-1289, 1677-92.

In late April, DOT announced its intention to "redesignate" HLF a terrorist organization and permitted HLF until May 15 to submit material for the "administrative record." DOT rejected HLF's request for additional time to gather and submit evidence for the agency's consideration. On May 31, DOT redesignated HLF a terrorist and filed the administrative record that it had compiled. The record includes HLF's motion for preliminary injunction and the attached exhibits, including the Baker, Mohmed, and Abumoharram declarations. Apart from HLF's

sworn declarations, the administrative record consists of hearsay (often multiple hearsay) in the form of anonymous foreign government intelligence reports, summaries of allegations by anonymous informants, newspaper articles, and similar materials. DOT's redesignation decision ignores HLF's evidence, including its sworn declarations, and credits only the government's hearsay.

Also on May 31, the government filed its opposition to HLF's motion for preliminary injunction and moved for summary judgment on HLF's APA claim and to dismiss under Rule 12(b)(6) for failure to state a claim on all other claims. Neither in its May 31 motion nor at any other time did the government seek summary judgment on HLF's constitutional and RFRA claims.

On July 11, HLF filed its first amended complaint. App. 78-110. The amended complaint adds a claim for a violation of the equal protection component of the Fifth Amendment Due Process Clause. The amended complaint includes the following factual allegations (among others), which must be taken as true for purposes of a Rule 12(b)(6) motion to dismiss: (1) HLF "is an American foundation that has worked to foster peace and that opposes terrorism in any form," App. 80 (Amended Complaint ("AC") ¶ 5); (2) HLF "has never donated funds or provided services to Hamas" or any other designated terrorist organization, and it "has never donated funds or provided services for the purpose of supporting Hamas" or any other designated terrorist organization, App. 81 (AC ¶ 8); and (3) "[n]either Hamas nor any other [designated terrorist organization] controls or has an interest in [HLF]" or "in any of [HLF's] assets, including the blocked assets at issue here," App. 81 (AC ¶ 9).

After refusing HLF's requests to conduct discovery and for an evidentiary hearing, *e.g.*, JA57-59; App. 29 & n.4, the district court granted summary judgment to the government on HLF's APA claim, with a limited exception, and it dismissed all

remaining claims, except for one aspect of the Fourth Amendment claim, under Rule 12(b)(6), App. 23-75. The district court noted that "[t]he Government has moved to dismiss, not for summary judgment, on the remaining constitutional and RFRA claims. Because the Court has not converted the motion to dismiss to one for summary judgment, HLF's request for Rule 56(f) discovery is inapplicable to those claims." App. 32 n.10.

HLF appealed. On the constitutional and RFRA claims, the court of appeals found that the district court had abused its discretion by going beyond HLF's amended complaint to grant the government's Rule 12(b)(6) motion. The court found, however, that the error in conducting an "unannounced summary judgment proceeding" was harmless because "the ample record evidence (particularly taking into account the classified information presented to us *in camera*) establishing HLF's role in the funding of Hamas and of its terrorist activities is incontrovertible." App. 16. The court noted that "[i]n a general case, perhaps the opportunity for discovery might have produced precisely that which was lacking." It declared, however, that "this is not a general case. This is a specific case involving sensitive issues of national security and foreign policy." *Id.* at 16-17. The court concluded that "[a]lthough we hold that the district court erred in not converting the government's 12(b)(6) motion for dismissal into a motion for summary judgment, we find that error to be harmless because the government should have been granted summary judgment, as we hereby do, on the basis of the administrative record." *Id.* at 20. Thus, having faulted the district court's "unannounced summary judgment proceeding," the court of appeals conducted precisely such a proceeding of its own.

The court of appeals also found, contrary to *Centrifugal Casting Machine Co. v. American Bank & Trust Co.*, 966 F.2d 1348 (10th Cir. 1992), that a right to property need not be "legally cognizable" to constitute an "interest" in property for purposes of

IEEPA, 50 U.S.C. § 1702(a)(1)(B). App. 9-10. And the court concluded that the DOT designation and redesignation provided HLF with all the process it was due, despite the absence of any meaningful adversarial hearing and despite the DOT's reliance on secret evidence. *Id.* at 11-13.

STATEMENT OF THE FACTS

If the courts below had addressed HLF's constitutional and RFRA claims as Fed. R. Civ. P. 12(b)(6) requires, the statement of facts would consist solely of the facts alleged in HLF's amended complaint. App. 78-110. Those allegations must be taken as true for purposes of a motion to dismiss under Rule 12(b)(6)--the only motion the government filed with respect to those claims. *E.g.*, *id.* at 32 n.10. We go beyond the allegations in the amended complaint only to demonstrate the error of the court of appeals' assertion that the evidence of HLF's support for Hamas is "incontrovertible." *Id.* at 16. As we demonstrate below, HLF *did* controvert the government's evidence, and it did so *without the benefit of discovery.*

In support of its motion for preliminary injunction, HLF produced substantial evidence demonstrating that it does not fund Hamas. As noted above, Shukri Baker, Dalell Mohmed, and Mohammed Abumoharram provided sworn declarations detailing HLF's activities and rebutting the government's accusations point by point. JA522-81, 1130-34. They explained, under oath, that neither they nor HLF have ever supported Hamas, and that Hamas' terrorist activities are repugnant to them personally and to the ideals of HLF. And they explained, under oath, how HLF distributed its charitable funds throughout the world, including Palestine, Turkey, Chechnya, Kosovo, and the United States (to Oklahoma City bombing victims, Texas tornado victims, and New York World Trade Center victims, for example).

The government ignored HLF's sworn declarations denying support for Hamas. Its conclusion that HLF funded Hamas rests on unsworn hearsay, salient portions of which we discuss below.

A. The Anati Statements.

The government relied below on an Israeli "summary" of alleged statements by Mohammed Anati, HLF's former West Bank manager, to Israeli interrogators. AR1205, 1263-78. But Anati's actual statements--which HLF obtained from Anati's counsel, had translated, and placed in the district court record, JA964-1078--present a much different picture than the summary. For example, the summary omits Anati's repeated insistence that HLF has no connection with Hamas, did not fund Hamas, and gave no preference to Hamas orphans and families, and it distorts what Anati actually said in numerous respects. *E.g.*, JA966, 980, 1020, 1058, 1081.

In addition to relying on the misleading "summary" of Anati's statements, the government omitted from the administrative record Anati's November 1998 sworn testimony before an Israeli court. In that testimony, Anati repeatedly denied any connection between HLF and Hamas. He testified, for example, "I worked in the organization [HLF], I knew everything, and I knew that the work is charity work with no connection to Hamas." He added, "I knew everything about the organization from A to Z. Therefore I was convinced that our actions are for charity with no connection to politics, Hamas, or any other organization." JA903, 906-08. And Anati declared that if he had learned that HLF was connected to Hamas, "I would quit my job." JA901. Anati's testimony squarely contradicts the government's claim that HLF funds Hamas.

B. The Recipients of HLF Funds.

The government asserted below that HLF's alleged affiliation with Hamas can be inferred from the recipients of its funds. But HLF demonstrated, even without discovery, that the government's claims are incorrect and misleading.

1. Support for Orphans and Families.–The government argued that HLF favored the families of Hamas activists and "'martyrs." It relied largely for this claim on a binder it found among HLF's seized documents, titled "Orphans Sponsorship Program, Gaza in July 1999." The binder contains pictures and information--including the father's cause of death--about Palestinian orphans available for sponsorship. According to the government, the binder reflects that "[a]pproximately 77 of the [396] orphans . . . are represented to be children of 'martyrs.'" Defendants' Statement of Material Facts as to Which There Is No Genuine Issue ["Statement"] ¶ 91.

Counsel for HLF asked HLF's manager in Gaza, Mohammed Abumoharram, to investigate the circumstances of deaths of the fathers listed as "martyr." The investigation shows that only four or five of the "martyr" fathers may have died while in the commission of, or preparing for, a terrorist act. By contrast, ten of the fathers were killed, by Hamas or other groups, *because they were thought to be spies for Israel.*[2/] Although

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[2/] *See also* AR2734 (in his June 2, 1998 interrogation, Anati notes that HLF supports "[s]ons of people who died in every way, including the [I]ntifada, Hamas, Fatah, 'Meshihi [Christians],' *and also sons of those who cooperate with Israel*") (emphasis added). In 2000, Dalell Mohmed of HLF requested that the State Department provide a list of Palestinian orphans and widows to whom HLF should not provide assistance. In response, the State Department referred Mohmed to the government web site that lists designated terrorist organizations.

Abumoharram acknowledges that he cannot always determine how the father of an orphan died, he adds: "What I can say without any question, however, is that there are many orphans whose fathers are called 'shaheed' ('martyr') who were not guilty of acts of terrorism on behalf of Hamas or anyone else." JA1134.

The government's claim that HLF favored Hamas orphans and families fails for another reason: an Israeli military court, hardly a sympathetic forum to HLF, made findings to the contrary during a detention proceeding involving Anati. That ruling, rendered in September 1998, assessed the evidence against Anati to that point. In part, the ruling quotes the determination of the trial court that "[t]he evidentiary material in this matter . . . is scanty and not unequivocal. The material does not indicate a direct connection between [HLF], in Israel or outside Israel, and the Hamas, nor does it indicate specific support of the families of members of that organization." JA1137. The ruling quotes the trial court's further comment that "[t]he considerable amount of evidence which was seized indicates that [HLF] dealt with applications for assistance by hundreds and thousands of families--of which a few dozen have been identified as families of detained or dead members of Hamas." JA1138. In addition, the court noted that the Israeli military prosecutor "agrees that it is impossible to prove priority in the allocation of funds to members of the Hamas members who had been hurt." JA1140.

2. Zakat Committees, Hospitals, and Other Humanitarian Entities.--The government claimed that the Palestinian Zakat committees and other humanitarian entities to

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JA926. That list does not appear to name any of the orphans or families to which HLF gave assistance. JA1170-1243.

which HLF donated funds are Hamas controlled.[3/] Here, as elsewhere, the government ignored the sworn evidence that HLF presented to show that support for these entities does not equate with support for Hamas. For example, Dr. Rashid Khalidi--an expert on Palestine whose declaration HLF submitted to the district court--explains that "instrumental in the distribution of aid [in Palestine] have been the zakat committees, which are utilized by [the United Nations], foreign NGO's, and the [Palestinian Authority's] own Ministry of Waqf and Religious Affairs, as conduits for their assistance, since these committees have a grassroots infrastructure among the poorest sectors of society." AR2443. The government and the courts below ignored Dr. Khalidi's sworn declaration.

Apart from ignoring contrary evidence, the government and the courts below ignored the fact that the United States government funds some of the purportedly Hamas entities at issue. To cite just one example, the government asserted that Fawaz Hamdan is a Hamas activist; that Hamdan is the Administrative Director of the Al Razi Hospital; that the Al Razi Hospital is administered by the Jenin Zakat Committee, which Hamas controls; and that HLF funded the Al Razi Hospital directly and through the Jenin Zakat Committee. Statement ¶¶ 65, 71, 72. The government relied in part on these facts for its claim that HLF supports Hamas. But HLF presented evidence that the United States Agency for International Development--an independent federal agency that reports to the Secretary of State--boasted in April 2002 that it, "along with other international funders," had

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[3/] Contrary to the government's claim, it appears that none of the people named as Hamas activists controlling the Zakat committees and hospitals to which HLF donated are named on the May 31, 2002 OFAC list of "specially designated nationals and blocked persons," which runs 69 pages and includes hundreds of persons and entities. JA1175-1243.

provided "food, water and urgently needed medical supplies" to, among other institutions, "Al-Razi Hospital." JA1249.

C. Unnamed FBI Informants.

The government relied in the courts below on eight unnamed FBI informants. Statement ¶¶ 92-99. Other than the FBI's unsworn assertion that seven of the informants have provided reliable information in the past, the government offered no basis for concluding that they may be trusted. It did not describe the basis of their purported knowledge (first-hand knowledge, hearsay, rumor, speculation). And it did not even place *redacted* versions of their interview memoranda in the administrative record, to permit OFAC, HLF, and the court to assess the quality of the informants' purported information.

D. The Palestinian Authority's Closure of HLF for Alleged Affiliation With Hamas.

The government asserted that the Palestinian Authority closed HLF in 1997, and it implied that the PA had recently expressed its disapproval of the Foundation. Statement ¶ 68. The court of appeals treated this allegation as established fact. App. 9. But Baker points out in his declaration that "[w]ithin a few weeks, the P/A told us that we could reopen because its representatives had satisfied themselves that HLF was 'transparent' and 'non-allied.' Since then, we have had a completely smooth relationship with the Palestinian Authority." AR2401; *see* AR2434-35 (Abumoharram notes that "[t]he Palestinian Authority frequently directs new organizations to our offices to see how we conduct our affairs so that the new organizations can understand how to spend and account for money in a way that is transparent and above reproach").

E. The 1993 Philadelphia Meeting.

The government relied below on a 1993 meeting in Philadelphia, held almost two years before President Clinton designated Hamas a terrorist organization. The evidence shows that HLF representatives attended a gathering with 22 other people, of whom five have been identified as alleged Hamas members or supporters. AR68-70, 1400 (25 people attended the meeting). At the meeting, no one advocated violence or terrorist acts. The discussion focused on means of opposing the recent Oslo accords, ending Israeli occupation of Palestine, advancing an Islamist agenda, and supporting the Palestinian people.

Baker spoke at the October 1993 meeting. He rejected ties between HLF and any particular faction in Palestine and insisted on the legality of HLF's operations. Baker stated in part, for example, "[A]s an organization registered in America we shouldn't be associated with this party or that . . . should not be the charitable arm of this or that." AR1434. He concluded: "We [HLF] have to be cautious with spending. We can't get involved in transaction[s] that can violate our status. We are an organization that has to look after its own interests--not to spend any money on any project before carefully studying it. We shouldn't do anything that is contrary to the law." AR1434. Baker added, "The only thing which we shouldn't do is illegal transactions. This we shouldn't do. If anyone framed you, it will become a disaster. We shouldn't participate in any illegal transactions." AR1435.

F. Sheikh Jamil Hamami.

The government asked the lower courts to conclude that HLF supported Hamas from HLF's alleged connections to Sheikh Jamil Hamami--and, in particular, from Hamami's 1994

fundraising trip to the United States that HLF sponsored in part. *E.g.*, JA1524, 1532-34, 1536; Statement ¶¶ 22, 48, 60, 61, 80.

In direct contradiction to this claim, HLF showed that Sheikh Hamami, far from being a notorious Hamas terrorist, was selected by the Jerusalem office of the United States Information Service, American Consulate General, to participate in the United States government's Regional International Visitor Program. Hamami accepted the government's invitation and came to the United States in 1999 to meet with (among others) Jewish organizations interested in promoting peace in the Middle East. The letters from United States government officials inviting Hamami and arranging his trip refer to him as a "distinguished gentlem[a]n" and pronounce the government "pleased and honored that you have accepted our invitation to take part in the International Visitor Program." JA1677-92.

* * * *

This summary does not canvass all of the evidence in the record below or address all of the government's contentions. We present it merely to show that, contrary to the court of appeals' assertion that the evidence of HLF's support for Hamas is "incontrovertible," App. 16, HLF in fact *did* controvert much of that evidence; it did so largely through sworn declarations, in stark contrast to the government's unsworn hearsay; and it did so *without the benefit of discovery*.

REASONS FOR GRANTING THE WRIT

This case presents several issues of profound national importance. *First*, HLF asserts the rights guaranteed to the non-moving party under Fed. R. Civ. P. 12(b) and 56 before summary judgment may be entered. The court of appeals ignored those rules, and the rights they embody, in the name of national security.

The case thus squarely presents the question whether national security concerns permit a court to disregard Rules 12(b) and 56.

Second, HLF asserts the fundamental due process principle that its constitutional and RFRA claims may not be adjudicated on the basis of secret evidence that it has no opportunity to review or rebut. This Court and the courts of appeals have repeatedly affirmed that principle. The court of appeals in this case abandons it.

Third, HLF--having been designated a terrorist and deprived of its property by government agency action--asserts the right to an adversarial, post-deprivation hearing with an impartial factfinder, following disclosure of the evidence on which the agency relied (under appropriate protective measures if necessary). This Court and the courts of appeals have repeatedly recognized that right in cases involving far less onerous property deprivations. The court of appeals rejects it for the sake of national security.

Fourth, HLF challenges OFAC's virtually unlimited interpretation of the key term "interest" in IEEPA--the purported source of the Executive's power to act summarily against HLF. The Tenth Circuit has adopted the position that HLF asserts--that "interest" requires a legally cognizable right in the property. The court of appeals ignored the Tenth Circuit's view and agreed with a recent, contrary decision of the Seventh Circuit. On all of these issues, this Court's guidance is essential in striking the proper balance between national security and the protection of individual rights.

I. THE COURT OF APPEALS' GRANT OF SUMMARY JUDGMENT CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

The court of appeals granted summary judgment to the government on HLF's constitutional and RFRA claims without permitting HLF to pursue *any* discovery on *any* issue. The court based its grant of summary judgment on inadmissible hearsay. The court disregarded sworn declarations that squarely contradict the central factual premise of its decision--that HLF funds Hamas. The court of appeals' decision ignores the Federal Rules of Civil Procedure, violates HLF's right to due process, and conflicts with countless decisions of this Court and the courts of appeals, as set forth below. The court's only explanation for its stark deviation from settled principles governing summary judgments consists of a reference to the national security implications of this case. App. 16-17. The Court should grant certiorari to determine whether the government's asserted national security concerns permit a complete disregard of Fed. R. Civ. P. 12(b) and 56 and the due process principles that underlie those rules.

The court of appeals' decision conflicts with decisions of this and other federal courts in three principal respects. First, by granting summary judgment without permitting HLF to conduct discovery, the court's decision conflicts with cases holding that before summary judgment may be entered, the non-moving party must have "a full opportunity to conduct discovery." *First Chicago International v. United Exchange Co.*, 836 F.2d 1375, 1381 (D.C. Cir. 1988); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 326 (1986) (Rule 56(c) contemplates entry of summary judgment "after adequate time for discovery"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 257 (1986) (noting "Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover

information that is essential to his opposition"); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303-04 (2d Cir. 2003); *Brown v. Mississippi Valley State University*, 311 F.3d 328, 333 (5th Cir. 2002); *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999); *Snook v. Trust Co. of Georgia Bank*, 859 F.2d 865, 870 (11th Cir. 1988).

Second, the court of appeals based its grant of summary judgment on evidence that Fed. R. Civ. P. 56(e) does not permit courts to consider. The court rested its central conclusion that HLF funds Hamas on "the administrative record" that the government compiled. App. 20. That record, to the extent it supports the government's contention that HLF supports Hamas, consists entirely of unsworn, inadmissible hearsay (often multiple hearsay). In light of Rule 56(e), the courts of appeals have held repeatedly that inadmissible hearsay "counts for nothing" at the summary judgment stage. *Gleklen v. Democratic Congressional Campaign Committee*, 199 F.3d 1365, 1369 (D.C. Cir. 2000). The court of appeals' decision thus conflicts with Rule 56(e) and decisions of other federal courts uniformly holding that inadmissible hearsay may not be considered in deciding a motion for summary judgment. *See, e.g., Sperle v. Michigan Department of Corrections*, 297 F.3d 483, 495 (6th Cir. 2002); *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 (2d Cir. 2000); *Macuba v. DeBoer*, 193 F.3d 1316, 1325 (11th Cir. 1999); *Pamintuan v. Nanticoke Memorial Hospital*, 192 F.3d 378, 387 n.13 (3d Cir. 1999).

Third, the court of appeals applies a standard of review that places it in conflict with this Court and the courts of appeals. Based on the government's hearsay administrative record, the court of appeals found it "incontrovertible" that HLF provided funding to the terrorist group Hamas. App. 16. But HLF submitted sworn declarations of its chief executive officer and two other key

officials that it did not fund Hamas. The court of appeals elected not to credit HLF's declarations and the other evidence it presented and resolved the central factual dispute in the case in the government's favor. The court's decision conflicts with decisions of this Court and other courts of appeals because the court made credibility determinations adverse to HLF, the non-moving party; it did not view the record evidence in the light most favorable to HLF; it did not credit HLF's evidence; and it did not draw all justifiable inferences in HLF's favor. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 552 (1999); *Anderson*, 477 U.S. at 255; *Athridge v. Rivas*, 312 F.3d 474, 477 (D.C. Cir. 2002); *see also, e.g., Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1127, 1131-32 (9th Cir. 2003); *Regents of the University of New Mexico v. Knight*, 321 F.3d 1111, 1117 (Fed. Cir. 2003); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002).

Because the court of appeals effectively recognized a national security exception to Rules 12(b) and 56, and because its decision conflicts with decisions of this Court and the other courts of appeals, the Court should grant the writ of certiorari.

II. THE COURT OF APPEALS' RELIANCE ON SECRET EVIDENCE TO ADJUDICATE HLF'S CONSTITUTIONAL AND RFRA CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

Contrary to fundamental tenets of due process, the court of appeals relied heavily on secret evidence in granting summary judgment against HLF. *E.g.*, App. 16 ("The ample record evidence (particularly taking into account the classified information presented to the court *in camera*) establishing HLF's role in the funding of Hamas and of its terrorist activities is

incontrovertible.").[4] HLF had no opportunity to review or respond to this evidence. Neither the court of appeals nor the government considered means of protecting truly sensitive information--intelligence sources and methods, for example--while giving HLF access to the substance of the allegations. The court of appeals' reliance on secret evidence to decide constitutional claims cuts against a long tradition in this country eschewing the use of such evidence in resolving the merits of disputes.[5] Because the use of secret evidence presents an issue of exceptional importance, the Court should grant certiorari.

The District of Columbia Circuit has declared--in a decision that the same court in this case did not even cite--that "[o]nly in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987). Courts enforce this principle because "[i]t is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex*

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[4] The government initially sought to present the classified information in the district court, over HLF's objection. That court found it unnecessary to consider the secret evidence. App. 29 n.3.

[5] As the court of appeals noted, IEEPA purports to authorize courts to consider, *ex parte* and *in camera*, classified information on which the agency relied. App. 12 (citing 50 U.S.C. § 1702(c)). HLF contends that use of such evidence under § 1702(c) to decide the merits of constitutional challenges to a blocking order violates due process.

parte, in camera submissions." *Id.* at 1060-61; *see, e.g., Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 410-14 (D.N.J. 1999) (use of secret evidence to support detention of potential deportee violates due process).[6] Ensuring both "the appearance and the reality of fairness," *Abourezk*, 785 F.2d at 1060, is particularly critical in a case such as this, which raises fundamental questions about the government's power to take summary action against private individuals and entities, without judicial sanction, in the name of national security.

The vast majority of cases permitting the government to withhold evidence in judicial proceedings involve the assertion of the state secrets privilege to prevent the litigant from obtaining discovery,[7] or (as in the FISA context) the use of *ex parte* procedures to determine the legality of the means by which

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[6] *Abourezk* recognizes a narrow exception to this principle where the government raises "acute national security concerns," and then only conditioned on "proper invocation of the [state secrets] privilege; a demonstration of compelling national security concerns; and public disclosure by the government, prior to any *in camera* inspection, of as much of the material as it could divulge without compromising the privilege." 785 F.2d at 1061. The government satisfied none of these conditions here.

[7] *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998); *United States v. Yunis*, 924 F.2d 1086, 1095 (D.C. Cir. 1991); *Ellsberg v. Mitchell*, 709 F.2d 51, 55-56 (D.C. Cir. 1983).

information was obtained.[8/] Here, by contrast, the government "use[d] secret information as a sword" to defeat HLF's claims on the merits. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995).

The court of appeals' reliance on secret evidence to enter summary judgment against HLF on the merits of its constitutional and RFRA claims marks a dangerous inroad on the adversarial system of justice and the basic principles of due process which that system embodies. The Court should grant certiorari to determine whether the government's asserted national security concerns justify this fundamental departure from the nation's judicial tradition.

III. THE COURT SHOULD DETERMINE THE PROCESS THAT AN AGENCY MUST PROVIDE WHEN IT BRANDS A CHARITY A TERRORIST, SEIZES ITS ASSETS, AND PUTS IT OUT OF BUSINESS.

The amended complaint alleges that DOT's designation and redesignation of HLF as a terrorist and the seizure of its assets violated HLF's right to due process by depriving HLF of its property and liberty without an adversarial post-deprivation hearing, at which HLF would have the opportunity to test the evidence against it and to persuade a neutral factfinder that it is innocent. App. 100 (AC ¶ 54); *see* App. 86-87 (AC ¶¶ 25-26). This Court has made clear that its approval of limited pre-deprivation procedures, such as existed here, depends on the availability of post-deprivation hearings that permit the aggrieved party to contest fully the truth of the allegations against him. *See,*

[8/] *See, e.g., ACLU Foundation v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982).

e.g., Brock v. Roadway Express, Inc., 481 U.S. 252, 261-66 (1987); *Mackey v. Montrym*, 443 U.S. 1, 15 (1979); *Dixon* v. *Love*, 431 U.S. 105, 110-15 (1977); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609-10 (1974). The court of appeals' decision, holding that DOT afforded HLF all the process it was due and upholding the dismissal of HLF's due process claim under Rule 12(b)(6), App. 11-13, stands at odds with this principle.

The right to confront and cross-examine witnesses is fundamental to post-deprivation process under these circumstances. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *see id.* ("Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision."); *see also, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103 (1963); *Greene*, 360 U.S. at 496. HLF's alleged status as a terrorist organization turns on sharply disputed questions of fact, and due process thus requires an opportunity, in some forum, to "confront and cross-examine adverse witnesses."

In addition to denying HLF an opportunity to confront and cross-examine adverse witnesses, the government deprived HLF of its property and liberty in part on the basis of secret evidence that HLF had no opportunity to contest and through the use of false and unreliable evidence. App. 100 (AC ¶¶ 56, 58); *see* App. 87-90, 92-97 (AC ¶¶ 27, 28, 35, 39-45). Under settled principles, HLF is entitled to disclosure of the evidence--or, if full disclosure would cause demonstrable harm to national security, at least the substance of the allegations--on which the government relies to deprive it of liberty or property. *See, e.g., Black v. Romano*, 471 U.S. 606, 612 (1985); *Greene*, 360 U.S. at 496; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292,

300-05 (1937); *Otero v. Bridgeport Housing Authority*, 297 F.3d 142, 152 (2d Cir. 2002).

HLF is also entitled, as a matter of due process, not to be deprived of its liberty and property on the basis of unreliable evidence, including unreliable hearsay evidence. Courts have held that administrative agencies may consider hearsay, but only "if it bears satisfactory indicia of reliability." *EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (quotation omitted); *see Richardson v. Perales*, 402 U.S. 389, 407-08 (1971). Under these authorities, HLF's amended complaint sufficiently alleges a due process violation based on the government's use of undisclosed and unreliable information.

In each of these respects, the government's designation and redesignation of HLF as a terrorist organization and seizure of its property violated time-honored principles of procedural due process. The court of appeals' rejection of HLF's due process claim conflicts with a long line of decisions establishing the procedures that a government agency must afford when it deprives a person or entity of significant property and liberty interests.

IV. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER THE SCOPE OF THE TERM "INTEREST" IN IEEPA.

The DOT designated and redesignated HLF and seized its assets under the purported authority of IEEPA. That statute gives the President the power, under specified circumstances, to block "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B). HLF contended below that an "interest" under IEEPA must be legally enforceable and that, even under the government's view of the facts, Hamas has

no legally enforceable right to HLF's blocked assets. The court of appeals held that an "interest" could exist under IEEPA even if not legally enforceable. App. 9-10.

IEEPA does not define the term "interest."[9] In other contexts, courts have held that, for a person to have an interest in property, he "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (Fourteenth Amendment due process clause), meaning a claim that is "legally enforceable," *Miller v. Crystal Lake Park District*, 47 F.3d 865, 867 (7th Cir. 1995); *see, e.g., In re Carlson*, 263 F.3d 748, 750 (7th Cir. 2001) (phrase "'all legal or equitable interests . . . in property'" in the Bankruptcy Code "has been broadly interpreted to include any legally enforceable right").

The first case to consider this precise issue under IEEPA concluded that a foreign person or entity must have a legally enforceable right to property to invoke the President's blocking authority under IEEPA. *See Centrifugal Casting Machine Co. v. American Bank & Trust Co.*, 966 F.2d 1348 (10th Cir. 1992). At issue in *Centrifugal Casting* was whether Iraq had an "interest" in a payment under a letter of credit. The court of appeals found "compelling" the policy considerations underlying OFAC's blocking of Iraqi assets and concluded that it was "therefore required to construe Iraqi property interests broadly." *Id.* at 1351. The court added, however, that it was "not persuaded these policies would be furthered by construing the circumstances here to give rise to a property interest on behalf of Iraq that would not

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[9] OFAC defines "interest" circularly as "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 500.312; *see id.* § 500.311 (terms "property" and "property interest" include "any . . . property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent").

otherwise be cognizable under governing legal principles." *Id.* After an exhaustive analysis of the legal rights of the parties to a letter of credit, *see id.* at 1351-53, the court found "no legal authority for the proposition that a *potential* breach of contract claim, prior to the commencement of litigation, gives a putative plaintiff a *legally cognizable property interest* in the assets of the putative defendant," *id.* at 1353 (second emphasis added). In rejecting OFAC's position, the court "reiterate[d] our recognition that blocked Iraqi property interests are to be broadly construed so as to effectuate the purposes underlying the blocking orders." *Id.* at 1354. The court declared:

> We nonetheless are not at liberty to restructure the essential characteristics of a letter of credit in order to create a property interest that would not be recognized under the rules applicable to that internationally recognized financing instrument. Because those rules do not establish that Iraq has a *legally cognizable property interest* in the payment made to [the beneficiary] under the letter of credit, the policies underlying the blocking of Iraqi assets are simply not implicated.

Id. (emphasis added).

The court of appeals ignored *Centrifugal Casting* and relied instead on *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 2003 U.S. LEXIS 8207 (U.S. Nov. 10, 2003). App. 10.[10/] In *Global Relief*, the Seventh

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[10/] The government (but not the court of appeals) also relied on *Regan v. Wald*, 468 U.S. 222 (1984). *Regan* arose in the context of an embargo on travel to Cuba under the Trading With the Enemy Act ("TWEA"). The Court rejected the argument that the TWEA does not "encompass[] the power to regulate travel-related transactions." *Id.*

Circuit addressed the term "interest" in § 1702(a)(1)(B) and concluded that the term includes both legal ownership and what the court termed "beneficial interests." 315 F.3d at 753. Because the Global Relief Foundation "conducts its operations outside the United States" and its "funds are applied for the benefit of non-citizens," the Seventh Circuit concluded that the funds "are covered by § 1702(a)(1)(B)." *Id.* The court of appeals in this case adopted the *Global Relief* rationale and held that "[t]he interest need not be a legally protected one in order to be caught within the net of § 1702." App. 10. Thus, *Global Relief* and the decision in this case conflict squarely with *Centrifugal Casting*.

Although a court generally must uphold OFAC's "reasonable" and "defensible" interpretations of IEEPA, it may not "rubber-stamp" administrative determinations that are "inconsistent with a statutory mandate." *BATF v. FLRA*, 464 U.S. 89, 97 (1983) (quotations omitted); *see, e.g., Whitman v. American Trucking Association*, 531 U.S. 457, 481 (2001). OFAC's interpretation of the term "interest" in this case exceeds what Congress intended. That interpretation gives the President almost unlimited power to seize the assets of United States persons and entities, as long as the government can show a possibility that the assets will be used or donated overseas. The Court should grant certiorari to resolve the conflict in the circuits over the scope of the term "interest" and restore that term to its intended meaning.

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at 232 n.16. It noted that "[p]ayments for meals, lodging, and transportation in Cuba are all transactions with respect to property in which Cuba or Cubans have an interest." *Id.* Cubans plainly have a legally enforceable right to the food and services that they sell to American travelers. *Regan* is thus entirely consistent with *Centrifugal Casting*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 22, 2003 Decided June 20, 2003

No. 02-5307

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, APPELLANT

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 02cv00442)

John D. Cline argued the cause for appellant. With him on the briefs was *John W. Boyd.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Douglas Letter, Terrorism Litigation Counsel, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Roscoe C. Howard, Jr.*, U.S. Attorney, *H. Thomas Byron III*, Attorney, U.S. Department of Justice, and *David D. Aufhauser*, General Counsel, U.S. Department of Treasury.

Before: GINSBURG, *Chief Judge*, and SENTELLE and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: In December 2001, the Office of Foreign Asset Control ("OFAC") designated Holy Land Foundation ("HLF") as a "Specially Designated Global Terrorist" ("SDGT") pursuant to an Executive Order issued under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* ("IEEPA"). This designation was accompanied by an order blocking all of the organization's assets. HLF brought an action in the district court challenging this designation and before us now appeals the lower court's decision which affirmed OFAC's actions and dismissed the complaint in substantial part. For the reasons explained below, we hereby affirm the district court's dismissal in part, and order summary judgment for the government.

I. Background

The IEEPA, 50 U.S.C. § 1701 *et seq.*, authorizes the President to declare a national emergency when an extraordinary threat to the United States arises that originates in substantial part in a foreign state. Such a declaration clothes the President with extensive authority

set out in 50 U.S.C. § 1702. Under that section he may investigate, regulate, or prohibit transactions in foreign exchange, banking transfers, and importation or exportation of currency or securities by persons or with respect to property, subject to the jurisdiction of the United States. § 1702(a)(1)(A). Of further special concern to the Holy Land Foundation, he may

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States. . . .

§ 1702(a)(1)(B).

In 1995, the President issued Executive Order 12,947 pursuant to the IEEPA. Exec. Order No. 12,947 (60 Fed. Reg. 5079 (Jan. 23, 1995)). That order designated certain terrorist organizations, including the Palestinian organization Hamas, as "Specially Designated Terrorists," or SDTs, and blocked all of their property and interests in property. The order also allowed for additional designations if an organization or person is found to be "owned or controlled by, or to act for or on behalf of" an SDT. *Id.*

In 2001, as part of his response to the attacks of September 11, the President issued Executive Order 13,224, similar to Order 12,947, pursuant to the IEEPA. Exec. Order No. 13,224 (66 Fed. Reg. 49,079 (Sept. 23, 2001)). Order 13,224 designated specified terrorist organizations, again including Hamas, as "Specially Designated

Global Terrorists," or SDGTs, and blocked all of their property and interests in property subject to the jurisdiction of the United States. That order also allowed for additional SDGTs to be designated if organizations or persons are found to "act for or on behalf of" or are "owned or controlled by" designated terrorists, or they "assist in, sponsor, or provide . . . support for," or are "otherwise associated" with them. *Id.*

HLF was originally established as the Occupied Land Fund and incorporated as a tax-exempt organization in California in 1989. In 1991 it changed its corporate name to the Holy Land Foundation for Relief and Development and moved to Texas. It describes itself as "the largest Muslim charity in the United States." In December 2001, OFAC, a division of the Department of the Treasury, acting pursuant to the IEEPA and the two Executive Orders (13,224 and 12,947), designated HLF as both an SDT and an SDGT and blocked all of its assets. The designations were based on information supporting the proposition that HLF was closely linked to Hamas. Soon thereafter, HLF filed a complaint in district court challenging its designations as a terrorist organization and the seizure of its assets, and alleging that its rights under the First, Fourth, and Fifth Amendments, its right to free exercise of religion under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), and its rights under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), had all been violated. HLF also filed a motion for a preliminary injunction, seeking to enjoin the government from blocking or freezing its assets. In support of the motion, HLF attached exhibits purportedly showing that it was not linked to Hamas and therefore not a terrorist organization. Subsequently, in May 2002, the OFAC

redesignated HLF as an SDT and an SDGT, and filed with the district court an administrative record which included HLF's motion for a preliminary injunction with attached exhibits.

In response to HLF's pleadings, the government moved for summary judgment on the APA claim and to dismiss the remaining claims for failure to state a claim. HLF then filed an opposition to the government's motion, attaching additional exhibits and seeking discovery. The government moved to strike all of HLF's exhibits that were not part of the administrative record and to bar an evidentiary hearing.

The district court conducted a hearing, consisting entirely of oral argument by counsel, on the motions. The court then issued its decision. It granted summary judgment on the HLF's APA claim; dismissed, under Rule 12(b)(6), the remaining claims except for one aspect of the Fourth Amendment claim; and granted the government's motion to strike HLF's exhibits. *Holy Land Found. for Relief & Dev. v. Ashcroft,* 219 F. Supp. 2d 57 (D.D.C. 2002).

II. The District Court's Opinion

The Holy Land Foundation attempted to supplement the record before the district court by the addition of exhibits attached to its opposition to the defendants' motion to dismiss. The government moved *in limine* to strike the supplemental material. The district court granted the government's motion, holding that APA review "must ordinarily be confined to the administrative record." *Id.* at 65 (citing *Camp v. Pitts,* 411 U.S. 138, 142 (1973)). The court further rejected HLF's argument that the IEEPA authorizes the blocking of property only where a

foreign country or foreign national has a legally enforceable interest in that property, by recognizing that the text of the statute and the cases which have interpreted it impose no restraint on the broad phrase "any interest" and that the Treasury Department's regular interpretation of that term to mean "an interest of any nature whatsoever, direct or indirect" had been repeatedly upheld by the courts. *See Holy Land,* 219 F. Supp. 2d at 67 (citing *Regan v. Wald,* 468 U.S. 222, 224, 225-26, 233-34 (1984)). The court then commenced a detailed review of the administrative record and reiterated the evidence on which the Treasury Department relied in making its determination to designate HLF as an SDGT. *See Holy Land,* 219 F. Supp. 2d at 69-75. It found that the record contained "ample evidence that (1) HLF has had financial connections to Hamas since its creation in 1989; (2) HLF leaders have been actively involved in various meetings with Hamas leaders; (3) HLF funds Hamas-controlled charitable organizations; (4) HLF provides financial support to the orphans and families of Hamas martyrs and prisoners; (5) HLF's Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that HLF funds Hamas." *Id.* at 69. The court concluded, based on the substantial evidence in the record, Treasury's determination that HLF acts for or on behalf of Hamas was not arbitrary and capricious, and therefore, upheld the agency's reasonable determination.

The court then turned to the remainder of HLF's claims, and dismissed all but one under Federal Rule of Civil Procedure 12(b)(6). First, the court rejected HLF's contention that its due process rights had been violated because the government failed to provide notice and a hearing before its assets were blocked. The court found

that postponement of notice and hearing were justified in this case, under factors previously articulated by the Supreme Court. *See id.* at 76-77 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974)). The district court also rejected HLF's claim under a substantive due process theory, holding that the designation and blocking were not arbitrary and capricious and "did not rise to the level of a constitutional violation." *See id.* at 77. The court dismissed HLF's constitutional claims finding that the designation and blocking order did not violate the entity's First Amendment right to freedom of association, stating that they "do not prohibit membership in Hamas or endorsement of its views, and therefore do not implicate HLF's associational rights." *Id.* at 81. Additionally, the court found that HLF's freedom of speech First Amendment rights had not been violated because designation and blocking of funds promote the important and substantial governmental interest in combating terrorism by undermining its financial base, and there is no other, narrower means of ensuring that charitable contributions to a terrorist organization are used for a legitimate purpose. *See id.* at 81-82.

Finally, the district court concluded that HLF lacked the ability to invoke its own free exercise rights under the Religious Freedom Restoration Act because it had not alleged it was a religious organization or that it engaged in an "actual exercise of religion" as an organization. *Id.* at 83. Likewise, the court held that HLF lacked standing to invoke the free exercise rights of third parties, such as its donors and employees. *See id.* at 83-84. The court denied the requested preliminary injunction because HLF had failed to demonstrate a substantial likelihood of success on the merits and because injury to the government and the

public interest supported the executive's use of designation and blocking as a means to advance the government's foreign policy and national security. *Id.* at 84.

III. Analysis

We review the district court's dismissal for failure to state a claim under Rule 12(b)(6) *de novo*. *See Browning v. Clinton,* 292 F.3d 235, 242 (D.C. Cir. 2002). Additionally, the actions of the Treasury Department in designating HLF as a SDGT are governed by the judicial review provisions of the APA, 5 U.S.C. § 706(2)(A). Therefore, if the OFAC's actions were not arbitrary and capricious, and were based on substantial evidence, we must affirm.

As a first matter, we reject HLF's claim that its designation exceeded Treasury's authority under the APA, and affirm the district court's dismissal of that claim. The district court correctly reviewed the actions of the Treasury Department under the highly deferential "arbitrary and capricious" standard. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). The district court noted that this standard does not allow the courts to undertake their own factfinding, but to review the agency record to determine whether the agency's decision was supported by a rational basis. *See Holy Land,* 219 F. Supp. 2d at 67 (citing *Camp,* 411 U.S. at 142).

As demonstrated by the district court's survey in the opinion below, Treasury's decision to designate HLF as an SDGT was based on ample evidence in a massive administrative record. HLF attacks the reasonableness of this determination by contending that Treasury relied on hearsay evidence to reach its conclusion. This argument is unavailing as it is clear that the government may decide to

designate an entity based on a broad range of evidence, including intelligence data and hearsay declarations. *See National Council of Resistance v. Dep't of State,* 251 F.3d 192, 196 (D.C. Cir. 2001) (*"NCOR"*). HLF also argues that Treasury was arbitrary and capricious in relying on information that predated the 1995 designation of Hamas as a terrorist organization. However, as the district court noted, it was clearly rational for Treasury to consider HLF's genesis and history, which closely connect it with Hamas. *See Holy Land,* 219 F. Supp. 2d at 74. There was no plausible evidence presented which showed that these ties had been severed. The HLF officers and directors who dealt with Hamas until 1995 remained with HLF in their respective capacities until HLF itself was designated. *See id.* There was ample record evidence, in any case, that HLF continued beyond 1995 to maintain its ties with Hamas and continued to give money to entities controlled by and associated with Hamas. This evidence included the testimony of numerous FBI sources and findings by both Israeli and Palestinian governmental authorities.

Finally, the district court correctly rejected HLF's argument that the IEEPA permits blocking of property only where there is a "legally enforceable" interest to be blocked. *See Holy Land,* 219 F. Supp. 2d at 67. The plain text of the statute belies HLF's contention because it authorizes the blocking of property in which the designated foreign national or country has "any interest." 50 U.S.C. § 1702(a)(1)(B). The language therefore imposes no limit on the scope of the interest, and OFAC has defined this statutory term, pursuant to explicit authorization from Congress, 50 U.S.C. § 1704, to mean, "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 500.311-.312. We have upheld Treasury's authority to

define these interests. *See Consarc Corp. v. Iraqi Ministry,* 27 F.3d 695, 701 (D.C. Cir. 1994) (Treasury "may choose and apply its own definition of property interests, subject to deferential judicial review."). The Seventh Circuit eloquently dealt with the applicability of the IEEPA to more than traditional "legal interests" in *Global Relief Foundation, Inc. v. O'Neal,* 315 F.3d 748 (7th Cir. 2002). In that case, the Global Relief Foundation, like the HLF in the present case, argued that the word "interest" in § 1702(a)(1)(B) "refer[red] to a *legal* interest, in the way that a trustee is legal owner of the corpus even if someone else enjoys the beneficial interest." *Id.* at 753 (emphasis in original). The *Global Relief Foundation* court rejected that construction as do we, reasoning that "[t]he statute is designed to give the President means to control assets that could be used by enemy aliens." *Id.* That risk is at least as much raised by the prospect of the foreign terrorists holding the beneficial interest, or an interest not defined in traditional common law terms as it is by a legal interest which might be a pure fiction. We find the reasoning of the Seventh Circuit unassailable and join it. The interest need not be a legally protected one in order to be caught within the net of § 1702. In this case, there was ample evidence of foreign "interests" in HLF's assets. There was evidence demonstrating that HLF operated as a fundraiser for Hamas in the United States and that Hamas officials provided HLF with funds. Therefore, OFAC did not exceed its authority when it blocked the assets after the designation, because OFAC needed only to determine that Hamas had an interest in HLF's property, and the record provided substantial evidence to support that conclusion.

The district court also properly disposed of HLF's due process claims under Rule 12(b)(6). First, OFAC's designation of HLF as an SDGT was not arbitrary and capricious, as demonstrated above. *See Holy Land,* 219 F. Supp. 2d at 77. Nor was the designation in any other way so egregiously unfair as to violate any constraints due process may place upon the substance of the agency's decision. Additionally, HLF was accorded all the administrative process it was due when it was redesignated as an SDGT. Even if Treasury's initial designation arguably violated HLF's due process rights, HLF's funds are blocked currently by a redesignation which Treasury applied in accordance with the requirements we outlined in *NCOR,* 251 F.3d 192.

In *NCOR,* we considered a due process challenge to the Secretary of State's designation of two foreign entities as foreign terrorist organizations under 8 U.S.C. § 1189. A designation under that statute carries a similar implication to those under the Executive Order at issue in this case. In the record before us in *NCOR,* the Secretary of State had afforded the entities neither a predesignation notice nor an opportunity to comment on the evidence against them. We held that the Constitution requires that the Secretary, in designating organizations as foreign terrorist organizations under that statute, must "afford to the entities under consideration [for designation] notice that the designation is impending," except that "[u]pon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States." *NCOR,* 251 F.3d at 208. Additionally, the Secretary must "afford to entities considered for imminent designation the opportunity to present,

at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations." *Id.* at 209.

In the present case, HLF was initially designated in 2001, in an action taken under the IEEPA-based sanctions program, flowing from a presidentially declared national emergency, as recognized by the district court. *See Holy Land,* 219 F. Supp. 2d at 76-77. However, in April, 2002, Treasury notified both Holy Land and the district court that it was reopening the administrative record and considering whether to redesignate HLF as an SDGT, on the basis of additional evidence linking HLF and Hamas. Holy Land was then given thirty-one days to respond to the redesignation and the new evidence. Holy Land did respond and the Treasury considered its response as well as the new evidence before deciding to redesignate HLF in May 2002. Therefore, Treasury provided HLF with the requisite notice and opportunity for response necessary to satisfy due process requirements. As we stated in *NCOR,* we do not require an agency to provide procedures which approximate a judicial trial, 251 F.3d at 209; therefore, HLF has no right to confront and cross-examine witnesses. Additionally, the notice "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute. This is within the privilege and the prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *Id.* at 208-09. The IEEPA expressly authorizes *ex parte* and *in camera* review of classified information in "any judicial review of a determination made under this section [that] was based on classified information." 50 U.S.C. § 1702(c).

We have had recent occasion to consider a claim that the use of classified information disclosed only to the court *ex parte* and *in camera* in the designation of a foreign terrorist organization under the AEDPA was violative of due process. In rejecting that claim, we recalled that "[t]he due process clause requires only that process which is due under the circumstances of the case." *People's Mojahedin Organization of Iran v. Dep't of State,* ___ F.3d ___ (D.C. Cir. May 9, 2003) (slip op. at 8) (citing *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). We further held that the standard set forth in *NCOR* applies not only to the notice provisions governing classification but to the full process of classification and that therefore "due process required the disclosure of *only* the unclassified portions of the administrative record." *Id.* at 7 (emphasis in original). Again, we emphasized the primacy of the Executive in controlling and exercising responsibility over access to classified information, and the Executive's "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Id.* at 7-8 (citations omitted). That the designation comes under an Executive Order issued under a different statutory scheme makes no difference. HLF's complaint, like that of the Designated Foreign Terrorists Organizations in the earlier cases, that due process prevents its designation based upon classified information to which it has not had access is of no avail.

HLF argues that the government violated its First Amendment rights of freedom of association and freedom of speech and its right to equal protection under the Fourteenth Amendment. HLF argued below that the government had violated its First Amendment rights by

prohibiting it from making any humanitarian contributions by blocking its assets. *See, e.g., FEC v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431, 440 (2001) (contributions of money fall within the First Amendment's protection of speech and political association). The district court dismissed these claims pursuant to Rule 12(b)(6), ruling that HLF failed to state a claim because "there is no constitutional right to facilitate terrorism." *Holy Land,* 219 F. Supp. 2d at 81 (quoting *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1133 (9th Cir. 2000)). HLF argues before us now that the district court erred in its disposition of these claims because the court should not have considered evidence beyond those allegations contained in the complaint in order to reach its conclusion and a necessary element in the court's reasoning on all three claims was that the HLF did support Hamas.

On review of a 12(b)(6) motion a court "must treat the complaint's factual allegations as true . . . and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal quotation omitted). Additionally, the liberal federal pleading standard requires that complaints need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2); *see also Browning,* 292 F.3d at 242. The amended complaint submitted by HLF on which the claims should have been considered, alleged that HLF had no knowing affiliation with Hamas or any other terrorist organization. In order to reach the outcome it did, that there is no constitutional right to fund terrorism, the district court first had to find that the HLF funds terrorism.

We agree with HLF that the district court could not have reached its conclusion without either improperly applying a heightened pleading standard or extending the scope of the 12(b)(6) review. As HLF reminds us, if in considering a motion to dismiss under Rule 12(b)(6) for failure of the complaint to state a claim for relief, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12(b). HLF argues that that is just what the court did in this case but without converting the proceeding to a Rule 56 proceeding and permitting HLF to either conduct discovery or come forward with additional evidence. It appears that HLF is correct. The district court apparently did consider the administrative record before it, but did not provide the opportunities for the presentation of additional material contemplated by Rule 12(b). This failure to comply with the procedures set forth in the Federal Rules of Civil Procedure constituted an abuse of discretion. Nonetheless, we find this error to be harmless, as HLF suffered no prejudice as a result. *See* 28 U.S.C. § 2111.

HLF could have suffered prejudice only if the failure of the court to convert the proceeding prevented it from coming forward with evidence sufficient to create a substantial question of fact material to the governing issues of the case. Specifically, could HLF have produced evidence upon which a reasonable trier of fact could have found that the designation and the blocking of assets violated its First or Fifth Amendment rights? *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). In this case, it could not

have. As set forth in other portions of this opinion, the law is established that there is no constitutional right to fund terrorism. The ample record evidence (particularly taking into account the classified information presented to the court *in camera*) establishing HLF's role in the funding of Hamas and of its terrorist activities is incontrovertible. While not in accordance with proper procedures, HLF has had every opportunity to come forward with some showing that that evidence is false or even that its ties to Hamas had been severed. HLF's presentations at the administrative stage did not reach this goal, even when HLF was given an additional thirty-one days to respond to its redesignation and to the new evidence in April of 2002. Even following the district court's judgment, while HLF attempted to supplement the record on appeal, the supplementary material could not have defeated the proposition established by the record evidence that Holy Land was a funder of the terrorist organization Hamas. Perhaps the supplemental evidence offered, while properly rejected from the administrative review claim should have been admitted for the unannounced summary judgment proceeding we now review. But it would have made no difference.

We do not propose that in every case in which a district court improperly goes beyond the pleadings in granting a motion to dismiss without affording the protections contemplated in Rule 12(b), a losing party will lose once more on appeal because of its inability to show what it would have produced had it been given the opportunity. In a general case, perhaps the opportunity for discovery might have produced precisely that which was lacking. However, this is not a general case. This is a specific case involving sensitive issues of national security and foreign

policy. In addition to the classified evidence that we have reviewed, all evidence from the government that is unclassified and otherwise discoverable is in the record before us, as is the evidence HLF produced in an effort to create a genuine factual dispute. Despite the district court's failure to follow the proper procedures, HLF had every opportunity and incentive to produce the evidence sufficient to rebut the ample evidence supporting the necessary conclusion that it was a funder of Hamas but could not do so. Thus, we review an adequate record and conclude that while the district court's conclusion may have been based upon improper procedure, there is no substantial question as to the material facts necessary to support the district court's judgment. Again, we hold as other courts have that there is no First Amendment right nor any other constitutional right to support terrorists, and that the record supports no conclusion that the designation or blocking violated any constitutional right of the HLF. *See, e.g., Humanitarian Law Project,* 205 F.3d at 1133.

IV. The RFRA Claim

Similar reasoning supports a grant of summary judgment for the government on HLF's claim that the designation and blocking order substantially burden its exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1. RFRA bars the government from placing a "substantial[ ] burden" on a person's exercise of religion "even if the burden results from a rule of general applicability," unless the government demonstrates a "compelling governmental interest," and uses the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(a), (b). Congress enacted RFRA in 1993 in response to the Supreme Court's

decision in *Employment Division, Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). The *Smith* decision had held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest." *City of Boerne v. Flores,* 521 U.S. 507, 514 (1997). In passing RFRA, Congress expressed its purpose as being "to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb.

Although the *City of Boerne* case held the RFRA unconstitutional as applied to state government action, we have held that without doubt "the portion [of RFRA] applicable to the federal government . . . survived the Supreme Court's decision striking down the statute as applied to the States." *Henderson v. Kennedy,* 265 F.3d 1072, 1073 (D.C. Cir. 2001). That the statute constitutionally applies against the federal government, however, only raises the question: does the present designation with its consequences substantially burden the exercise of religion on the facts before the district court and now before this court? Like the district court, we conclude that it does not.

The district court held that the Foundation could not state a viable RFRA claim on its own behalf because it had "define[d] itself as a 'non-profit charitable corporation' without any reference to its religious character or purpose." *Holy Land,* 219 F. Supp. 2d at 83. Effectively then, the court held that such a corporation is not "a person" within the meaning of 42 U.S.C. § 2000bb-1(c), which provides judicial relief to "a person whose religious exercise has been burdened in violation" of RFRA. That may

be, but we do not so decide today. We decide only that even if it is such a person, its religious exercise has not been burdened in violation of the statute. Congress in enacting RFRA only sought to provide process and standards for the protection of religious exercise. It did not purport to extend the definition of that term, and indeed defined the term "exercise of religion" only as meaning "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4). Even accepting the dubious proposition that a charitable corporation not otherwise defined can exercise religion as protected in the First Amendment, preventing such a corporation from aiding terrorists does not violate any right contemplated in the Constitution or the RFRA. No one on behalf of Holy Land Foundation has forwarded the proposition that the fomenting and spread of terrorism is mandated by the religion of Islam. At most they argue a right to charitable giving as a pillar of that religion. *Cf. Henderson v. Kennedy,* 253 F.3d 12, 17 (D.C. Cir. 2001) (holding that a general religious mandate "to spread the gospel by 'all available means'" does not provide RFRA protection to the sale of T-shirts). Acting against the funding of terrorism does not violate the free exercise rights protected by RFRA and the First Amendment. There is no free exercise right to fund terrorists. The record clearly supports a conclusion that HLF did. There is no evidence that Congress intended to create such a right within the RFRA. Therefore, HLF's activities do not fall within the RFRA's protection, and based on the evidence already in the record, summary judgment for the government is warranted.

V. Conclusion

Therefore, we uphold the district court's affirmance of the Treasury Department's decision to designate HLF as an SDGT and to block its assets. We also affirm the district court's dismissal of HLF's due process claims. Although we hold that the district court erred in not converting the government's 12(b)(6) motion for dismissal to a motion for summary judgment, we find that error to be harmless because the government should have been granted summary judgment, as we hereby do, on the basis of the administrative record.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5307 **September Term, 2002**

Holy Land Foundation for
Relief and Development,
Appellant

v.

John D. Ashcroft, in his official
capacity as Attorney General of
the United States, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 02cv00442)

Before: Ginsburg, *Chief Judge*, and Sentelle and Henderson, *Circuit Judges*.

JUDGMENT

(Filed Jun. 20, 2003)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed in part, and grant summary judgment for the appellees for

the reasons set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Date: June 20, 2003

Opinion for the court filed by Circuit Judge Sentelle.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT Plaintiff, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, *et al.* Defendants.	)	Civil Action No. 02-442 (GK)

MEMORANDUM OPINION

(Filed Aug. 8, 2002)

Plaintiff, Holy Land Foundation for Relief and Development ("HLF"), the largest Muslim charitable foundation in the country, brings this action challenging its designation as a terrorist organization and the resulting blocking of its assets as arbitrary, capricious and unconstitutional.

On December 4, 2001, the Office of Foreign Asset Control ("OFAC") of the United States Department of Treasury designated HLF as a specially designated terrorist ("SDT"), as a specially designated global terrorist ("SDGT"), and blocked all of its assets pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* ("IEEPA"), and Executive Orders 13224 and 12947.

Defendants are John Ashcroft, Attorney General; the United States Department of Justice; Paul O'Neill, Secretary of the Treasury; the United States Department of the

Treasury; Colin Powell, Secretary of State; and the United States Department of State (collectively the "Government").

In this action, HLF seeks to enjoin Defendants from continuing to block or otherwise interfere with access to or disposition of its assets. Plaintiff alleges that the blocking order violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*; the First, Fourth and Fifth Amendments of the United States Constitution; and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA").

The matters now before the Court are Plaintiff's Motion for a Preliminary Injunction [#3], Defendants' Motion to Dismiss and For Summary Judgment [#17], and Defendants' Motion *In Limine* and to Strike [#31]. Upon consideration of the motions, oppositions, replies, the arguments presented at the lengthy motions hearing on July 18, 2002, and the entire record herein, for the reasons stated below, the Court **denies** Plaintiff's Motion for a Preliminary Injunction, **grants in part and denies in part** Defendants' Motion to Dismiss and for Summary Judgment, and **grants** Defendants' Motion *In Limine* and to Strike.

I. STATUTORY FRAMEWORK

A. The International Emergency Economic Powers Act

In 1917, Congress enacted the Trading With the Enemy Act ("TWEA"), which granted the President "broad authority" to "investigate, regulate, . . . prevent or prohibit . . . transactions" in times of war or declared national emergencies. 50 U.S.C. app. § 5(b).

In 1977, Congress amended the TWEA and enacted the IEEPA to delineate the President's exercise of emergency economic powers in response to both wartime and peacetime crises under the TWEA and the IEEPA respectively. The 1977 legislation granted the President broad emergency economic power in wartime under the TWEA, and granted him similar, but not identical, emergency economic power in peacetime national emergencies under the IEEPA.

The IEEPA authorizes the President to declare a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). Upon declaration of a national emergency, the IEEPA further authorizes the President to

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Id. § 1702(a)(1)(B).

B. Executive Order 12947

Pursuant to his authority under the IEEPA, President Clinton issued Executive Order 12947 on January 23,

1995. President Clinton found that "grave acts of violence committed by foreign terrorists who threaten to disrupt the Middle East peace process" constitute an "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." E.O. 12947.

The Executive Order blocks all property and interests in property of the terrorist organizations and persons designated in the Order, known as specially designated terrorists, or SDTs. *Id.* § 1. The Islamic Resistance movement (commonly known as "Hamas"), a Palestinian military and political organization, is one of the SDTs identified in the Order. The Executive Order also permits the Secretary of the Treasury to designate additional SDTs if they are found, *inter alia,* to be "owned or controlled by, or to act for or on behalf of" an entity designated in that Order. *Id.* § 1(a)(iii).

C. Executive Order 13224

After the September 11, 2001 terrorist attacks on the United States, President Bush issued Executive Order 13224, declaring a national emergency with respect to the "grave acts of terrorism . . . and the continuing and immediate threat of further attacks on United States nationals or the United States." E.O. 13224.

As with the Executive Order issued by President Clinton, Executive Order 13224 blocks all property and interests in property of the designated terrorist organizations, known as specially designated global terrorists, or SDGTs. On October 31, 2001, the President designated Hamas as one of the SDGTs subject to the Order.

The Executive Order also authorizes the Secretary of the Treasury to designate additional SDGTs whose property or interests in property should be blocked because they "act for or on behalf of" or are "owned or controlled by" designated terrorists, or they "assist in, sponsor, or provide . . . support for," or are "otherwise associated" with them. *Id.* § 1(c)-(d).

II. PROCEDURAL BACKGROUND

HLF is a non-profit corporation organized in 1989, with its headquarters in Richardson, Texas. It was originally incorporated under the name Occupied Land Fund ("OLF"), and changed its corporate name to Holy Land Foundation for Relief and Development on September 16, 1991. Shukri Abu Baker is HLF's co-founder and has been Chief Executive Officer from its founding to the present.[1]

HLF alleges in its Complaint, that it is a § 501(c)(3) charitable organization that provides humanitarian aid throughout the world, although its primary focus has been to provide aid to the Palestinian population in the West Bank and Gaza.

On December 4, 2001, the Secretary of Treasury determined that HLF was subject to Executive Orders 12947 and 13224 because HLF "acts for or on behalf of"

[1] As addressed below, the administrative record contains evidence that Baker is involved with Hamas and raises funds on its behalf. HLF vigorously contests the accuracy of this evidence.

Hamas.[2] Accordingly, HLF was designated as an SDT under Executive Order 12947 and as an SDGT under Executive Order 13224. Pursuant to the designation, OFAC issued a "Blocking Notice" freezing all of HLF's funds, accounts and real property. At that time, OFAC also removed from HLF headquarters, all documents, computers, and furniture. Pursuant to the Blocking Notice, all transactions involving property in which HLF has any interest are prohibited without specific authorization from OFAC.

Plaintiff filed this action on March 11, 2002, seeking to enjoin Defendants from continuing to block or freeze its assets. Plaintiff alleges that the designation of HLF as an SDT and SDGT and attendant blocking violates (1) the APA; (2) the Due Process Clause of the Fifth Amendment; (3) the Takings Clause of the Fifth Amendment; (4) the Fourth Amendment; (5) First Amendment rights to freedom of speech and association; and (6) the Religious Freedom Restoration Act.

On May 31, 2002, the Government moved for summary judgment on the APA claim and moved to dismiss the remaining constitutional and RFRA claims. On June 24, 2002, the Government filed a Motion *In Limine* and To Strike, seeking to exclude evidence beyond the administrative record, to preclude the taking of evidence in an

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[2] The parties do not dispute that Hamas is a terrorist organization. As noted above, Hamas was designated as an SDT and SDGT on January 23, 1995, and on October 31, 2001, respectively.

evidentiary hearing, and to strike the exhibits attached to Plaintiff's Opposition and Reply brief.[3]

III. ANALYSIS

A. Motion *In Limine* and to Strike

HLF contends that the Court should supplement the administrative record with the exhibits attached to its Opposition to Defendants' Motion to Dismiss and for Summary Judgment and Reply in Support of Plaintiff's Motion for a Preliminary Injunction, and that the Court should permit Rule 56(f) discovery and supplement the administrative record accordingly.[4] The Government has filed a Motion *In Limine* and to Strike in response. For the reasons discussed below, the Court grants the Government's Motion.

It is well-established that the scope of review under the APA is narrow and must ordinarily be confined to the administrative record. *See Camp v. Pitts,* 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). HLF contends that courts have recognized circumstances under

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[3] On May 1, 2002, the Government filed a Motion to Submit Classified Evidence *In Camera* and *Ex Parte.* The Court has determined that it is not necessary to reach the merits of that issue in order to rule on the pending motions.

[4] HLF also argues that the Court should conduct an evidentiary hearing, which evidence would be added to the administrative record. The Court denied that request during the motions hearing conducted on July 18, 2002.

which the reviewing court may consider extra-record evidence, and that such circumstances are present here.

First, the heart of HLF's argument is that the Government must furnish "[t]he 'whole' administrative record," which includes "'all documents and materials directly or indirectly considered by agency decision-makers and includ[ing] evidence contrary to the agency's position.'" *Thompson v. Dep't of Labor,* 885 F.2d 551, 555 (9th Cir. 1989) (citations omitted). HLF reasons that the administrative record in this case is incomplete because OFAC likely considered evidence that it did not include in the record.

HLF's contention is entirely speculative, and it has failed to identify any documents that OFAC directly or indirectly considered and excluded from the 3130 page administrative record.[5] OFAC has certified that the administrative record on file is "complete and accurate." *See* Certification signed by James W. McCament (May 31, 2002). That certification is entitled to "a presumption of administrative regularity and good faith." *Federal Trade Commission v. Invention Submission Corp.,* 965 F.2d 1086, 1091 (D.C. Cir. 1992). Accordingly, HLF's speculative statements are insufficient to overcome this presumption and the well-settled principle that judicial review is confined to the administrative record.

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[5] Indeed, the Government specifically asserted at the motions hearing that the main documents HLF contends were improperly excluded from the record – Mohammad Anati's police interrogation statements and the transcript of his plea hearing – were not before OFAC when it made its determination.

Second, HLF contends that the Court should consider evidence outside the administrative record because OFAC has demonstrated bias and bad faith, and inadequacy of factfinding procedures, thereby warranting *de novo* review under 5 U.S.C. § 706(2)(F). Specifically, HLF contends that OFAC's redesignation of HLF as a terrorist[6] was a "sham," because that process had a predetermined outcome, and because the agency failed to consider virtually all of the evidence HLF submitted, and continued to rely on evidence that HLF had discredited.

HLF has made only conclusory allegations of bad faith and inadequate procedures. It has failed to provide any factual basis for its charges. The fact that OFAC redesignated HLF based, in part, on evidence that HLF contends is flawed is insufficient to suggest bias or inadequate procedures. OFAC did include in the record a significant portion of HLF's evidence challenging OFAC's factual determinations.[7] As addressed *infra* Part III.B.5.d., it was reasonable for OFAC to determine that the main declaration submitted by HLF was not credible, and that determination does not evidence bias or inadequacy in OFAC's

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[6] On May 31, 2002, the Government redesignated HLF as an SDT and SDGT based on the record of the first designation, additional unclassified and classified information, and a second evidentiary memorandum from the FBI to OFAC. *See* Newcomb Decl. ¶ 42.

[7] The exhibits attached to HLF's Motion for a Preliminary Injunction were considered by OFAC and incorporated into the administrative record. *See* Defs.' Reply Mem. in Supp. of Mot. *In Limine* and to Strike at 11.

procedures. Moreover, HLF was afforded an opportunity to submit further evidence to the agency, but failed to do so.[8]

In sum, HLF has not demonstrated that the Court should depart from traditional record review analysis in this case.[9] Accordingly, the Court will not permit discovery on the APA claim,[10] and the exhibits attached to Plaintiff's Motion to Dismiss and for Summary Judgment and Reply in Support of Plaintiff's Motion for a Preliminary Injunction will not be considered by the Court. The Court's review of the APA claim is therefore limited to the administrative record.

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[8] On April 30, 2002, OFAC sent HLF formal notification that it was considering redesignating HLF as an SDT and SDGT. At that time, HLF was afforded a 15-day period in which to respond to the administrative proceeding. On May 14, 2002, Plaintiff responded by requesting an additional thirty days to respond. OFAC did not agree to the extension, but committed to consider any information that Plaintiff submitted prior to the agency's action on the redesignation, and that it would also accept any information submitted after the redesignation decision was made. Plaintiff did not submit any further materials to OFAC and, on May 31, 2002, OFAC redesignated HLF.

[9] HLF also contends that the Court should consider extra-record evidence pursuant to *Esch v. Yeutter* because (1) OFAC did not adequately explain its decision in the record before the Court; (2) it failed to consider factors that are relevant to its final decision; (3) the case is so complex that the Court needs more evidence; and (4) evidence arising after the agency action shows that OFAC's decision was not correct. 876 F.2d 976, 991 (D.C. Cir. 1989). Again, HLF has made only conclusory allegations and has failed to demonstrate that any of these exceptions applies in this case.

[10] The Government has moved to dismiss, not for summary judgment, on the remaining constitutional and RFRA claims. Because the Court has not converted the motion to dismiss to one for summary judgment, HLF's request for Rule 56(f) discovery is inapplicable to those claims.

B. Administrative Procedure Act

As noted above, Plaintiff contends that OFAC's designation of HLF as an SDT and SDGT, resulting in the blocking of its assets, violates the APA. HLF makes three major arguments: (1) OFAC exceeded its statutory authority under the IEEPA because Hamas does not have a legally enforceable interest in HLF's property; (2) the blocking order violates the statute's humanitarian aid exception; and (3) the OFAC action was arbitrary, capricious, and without substantial evidence in the record. The Government has moved for summary judgment on the entire APA claim.

1. Summary Judgment Standard of Review

Under Fed. R. Civ. P. 56, a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

2. APA Standard of Review

An agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making this determination, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). If the "agency's reasons and policy choices . . . conform to 'certain minimal standards of

rationality' . . . the rule is reasonable and must be upheld," *Small Refiner Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 521 (D.C. Cir. 1983) (citation omitted), even though the Court itself might have made different choices.

As noted above, under arbitrary and capricious review, the Court does not undertake its own fact-finding. Instead, the Court must review the administrative record assembled by the agency to determine whether its decision was supported by a rational basis. *See Camp v. Pitts,* 411 U.S. 138, 142 (1973).

3. The IEEPA Does Not Require a Legally Enforceable Interest

The IEEPA provides, in relevant part, that the President may block "property in which any foreign country or a national thereof has any interest." IEEPA, 50 U.S.C. § 1702(a)(1)(B). HLF contends that this "interest" must constitute a "legally enforceable interest." Accordingly, HLF reasons that OFAC exceeded its statutory authority because it cannot establish that Hamas had any such interest in HLF's property. The Government argues that the IEEPA does not impose any such requirement of a legally enforceable interest on the President's authority. It reasons that OFAC need only determine that Hamas has "any interest" in HLF's property, which it reasonably did in this case. It is clear that both the text of the statute and the cases interpreting it support the Government's position.

First, the plain text of the IEEPA authorizes the blocking of property in which the designated foreign national or country has "*any* interest." IEEPA, 50 U.S.C. § 1702(a)(1)(B) (emphasis added). The language imposes

no constraints on that term. Moreover, Congress explicitly authorized the Executive to define the statutory terms of the IEEPA. *See id.* § 1704.[11] OFAC carried out that mandate and defined "interest" to mean "an interest of *any nature whatsoever,* direct or indirect." 31 C.F.R. 500.311-.312 (emphasis added). It is clear, then, that the plain text of the statute, as well as its implementing regulations, broadly define the term "interest," and do not impose the limitation advanced by Plaintiff.

Second, courts have repeatedly upheld OFAC's authority to interpret broadly the term "any interest" in the identical provisions of the IEEPA, and its predecessor statute, the TWEA. *See Regan v. Wald,* 468 U.S. 222, 224, 225-26, 233-34 (1984) (repeatedly stating that the phrase "any interest" must be construed in the broadest possible sense); *Consarc Corp. v. Iraqi Ministry,* 27 F.3d 695, 701-02 (D.C. Cir. 1994) (*"Consarc I"*) (finding that OFAC may choose and apply its own definition of property interests, subject to deferential judicial review, and that OFAC's application of its own regulations, "receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with that regulation"); *Consarc v. OFAC,* 71 F.3d 909 (D.C. Cir. 1995) (*"Consarc II"*) (referring to the expansive statutory grant of power under the IEEPA, and finding that a challenge to OFAC's interpretation of its own regulation must either demonstrate that the statute clearly forbids the agency's interpretation or that the interpretation is unreasonable).

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[11] "The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter." 50 U.S.C. 1704.

Third, in those cases where courts have found that a foreign nation or national had an interest in property under the IEEPA, they have not based that ruling on any statutory requirement that the interest be "legally enforceable." *See, e.g., Consarc II,* 71 F.3d at 909; *Consarc I,* 27 F.3d at 695; *Milena Ship Management Co. v. Newcomb,* 995 F.2d 620 (5th Cir. 1993).[12]

In sum, in light of the plain text of the IEEPA and OFAC's regulations broadly defining the term "interest," the deference that must be afforded to OFAC's interpretation of its own regulations, and the relevant case law, the Court concludes that the IEEPA does not limit the President's blocking authority to the existence of a legally enforceable interest.

4. The Humanitarian Aid Exception Authorizes Donations of "Articles," But Not of Money

The humanitarian aid exception under the IEEPA provides, in relevant part, that "[t]he authority granted to the President by [the IEEPA] does not include the authority to regulate or prohibit, directly or indirectly . . . donations, by persons subject to the jurisdiction of the United

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[12] HLF relies heavily on *Centrifugal Casting Mach. Co. v. American Bank & Trust Co.,* 966 F.2d 1348 (10th Cir. 1992), which is the only IEEPA case requiring a "legally enforceable interest." To the extent that the *Centrifugal Casting* court imposed such a requirement under the IEEPA, it did so against the weight of judicial authority to the contrary. Not only is this Court not persuaded by its reasoning, but it is not bound by a decision from the Tenth Circuit, especially in light of *Consarc I* and *Consarc II* from this Circuit.

States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering." IEEPA, 50 U.S.C. § 1702(b)(2). HLF contends that OFAC's blocking order violates this exception because HLF is prohibited from making any humanitarian aid contributions. The Government advances two arguments in response.

First, the Government contends that the humanitarian aid exception does not apply to blocked entities such as HLF. It reasons that this conclusion is compelled by the thrust of the statute, which prohibits a blocked entity such as HLF from using its funds for any purpose (including provision of humanitarian aid) without a license from OFAC.

In fact, the plain text of the statute compels the contrary conclusion. The statute explicitly states that the President's authority to *issue* the blocking order does not include the authority to prohibit humanitarian aid.[13] Accordingly, it is clear that the humanitarian aid exception applies to blocked entities such as HLF, and that the blocking itself cannot prohibit HLF from providing humanitarian aid to non-blocked entities.

Second, the Government contends that, even if the humanitarian aid exception applies to blocked entities, the

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[13] The main case the Government relies on, *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 866 (D.C. Cir. 1984), merely states the general rule that a designated entity must obtain an OFAC license prior to engaging in any transaction involving its assets. *American Airways* does not address the applicability of the humanitarian aid exception to blocked entities, and is therefore inapplicable to this case.

exception does not cover transfers of money. Both the text of the statute and case law do support this conclusion.

The statute explicitly refers to donations "of articles, such as food, clothing, and medicine," without any reference to monetary donations. *See* 50 U.S.C. 1702(b)(2). Moreover, the legislative history of the humanitarian aid exception makes it clear that Congress specifically chose to exclude monetary contributions from the exception. *Veterans Peace Convoy Inc. v. Schultz,* 722 F.Supp. 1425, 1431 (S.D. Tex. 1988) (determining after review of legislative history that statute "authorized donations of articles, but not monetary funds, thereby 'increasing the likelihood that the donation would be used for the intended purpose.'") (quoting testimony from Senate hearing).

Accordingly, the Court concludes that OFAC exceeded its statutory authority to the extent that it has prohibited HLF from providing humanitarian donations "of articles, such as food, clothing, and medicine."[14] OFAC did not, however, exceed its statutory authority by prohibiting HLF from making monetary contributions for humanitarian purposes.

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[14] The Court realizes that, in reality, this may be a distinction without a difference. If HLF cannot access its bank accounts, it cannot purchase food, clothing, and medicine. HLF counsel acknowledged as much at oral argument.

5. Designation of HLF as a Terrorist and Seizure of Its Assets Do Not Constitute Arbitrary and Capricious Agency Action

The seven volume, 3130 page administrative record in this case provides substantial support for OFAC's determination that HLF acts for or on behalf of Hamas. Specifically, as the following analysis demonstrates, the administrative record contains ample evidence that (1) HLF has had financial connections to Hamas since its creation in 1989; (2) HLF leaders have been actively involved in various meetings with Hamas leaders; (3) HLF funds Hamas-controlled charitable organizations; (4) HLF provides financial support to the orphans and families of Hamas martyrs and prisoners; (5) HLF's Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that HLF funds Hamas.[15]

a. HLF Had Early Financial Connections to Hamas

First, the administrative record demonstrates that HLF's financial connections to Hamas began as far back as 1988. Specifically, there is evidence that HLF raised funds for Hamas, that Hamas provided financial support to HLF, and that HLF paid for Hamas leaders to travel to the United States on fund-raising trips.

With respect to HLF's fund-raising on Hamas' behalf, the record contains a December 1988 and a December

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[15] HLF vigorously contests the accuracy, interpretation and context of this evidence, as well as the sufficiency of the record. These challenges are addressed *infra*.

1989 publication issued by Hamas. Both publications request that tax deductible donations be sent to OLF, HLF's former corporate name. *See* A.R. 1499-1500, 1511, 1529, 1531-35.

With respect to Hamas' funding of HLF, the evidence establishes that, in 1992, Hamas leaders and activists contributed $210,000 to HLF. The checks were from Hamas political leader Mousa Abu Marzook,[16] Hamas activist and Marzook associate Ismail Elbarrase, and from Marzook's associate and personal secretary Nasser Alkhatib. *See* A.R. 74, 684-87, 1926-27, 700. Indeed, HLF's 1993 tax return reflected that it received $210,000 from Marzook. *See* A.R. 700.

Further, there is evidence in the record that, at the same time Hamas was funding HLF, it was also funding a network of organizations connected to HLF. There is evidence that at least one of these organizations, Islamic Association for Palestine ("IAP"), has acted in support of Hamas.[17] The Government contends that HLF knew of Hamas' funding of these organizations because HLF's leaders were associated with or related on a familial basis to the leaders of the other funded organizations.

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[16] The record contains evidence that Marzook has been the leader of the political wing of Hamas since at least 1991. *See* A.R. 73-74, 639-78. In 1996, a federal court determined that Marzook should be extradited to Israel to face murder charges resulting from his alleged terrorist activity. *See* A.R. 269-91, 324-32; *see also Marzook v. Christopher,* 924 F.Supp. 565 (S.D.N.Y. 1996).

[17] There is evidence in the record that IAP distributes information on behalf of Hamas. *See* AR 1499-1535.

Finally, with respect to HLF's support of Hamas' fund-raising trips, between September 20, 1990 and March 9, 1994, HLF paid for senior Hamas leaders Sheikh Jamil Hamami and Dr. Mohammed Siyam to make eleven trips to the United States.[18] Each of the trips was charged to OLF or HLF's corporate credit card. *See* A.R. 73, 635-38.

b. HLF Officials Met With Hamas Leaders

Second, the administrative record contains evidence of two meetings between Hamas and HLF leaders – a 1993 Philadelphia, Pennsylvania meeting and a 1994 Oxford, Mississippi meeting.

The three-day Philadelphia conference was observed and recorded by the FBI. Five senior Hamas officials and three senior HLF leaders were in attendance.[19] Moreover, senior HLF official Shukri Abu Baker not only attended the conference, but also assisted in planning the meeting and made a presentation to the participants.

With respect to the Oxford, Mississippi meeting, FBI surveillance disclosed that Al-Aqsa Educational Fund (which was run by senior Hamas activist Abdelhaleem

[18] The record contains evidence that Hamami is a co-founder of Hamas, and that Siyam is a Hamas leader. *See* A.R. 72, 609-39.

[19] The following Hamas leaders and activists were at the meeting: Abdelhaleem Ashqar, Akram Kharroubi, Mohammad Al-Hanooti, Ismail Elbarasse, and Muin Kamel Mohammed Shabib. The HLF leaders in attendance were HLF co-founders Shukri Abu Baker and Ghassan Elashi, and HLF employee Haitham Maghawri. *See* A.R. 68, 251-65, 1400-11.

Ashqar) and HLF – the two major Muslim charities operating in the United States – had been in conflict over which organization would raise funds in the United States. *See* A.R. 1478, 1482-86. On March 14, 1994, Baker spoke with Hamami, who was in Oxford, Mississippi as part of an Al-Aqsa fund-raising tour. At that time, Hamami read a letter from Marzook to Ashqar directing Ashqar to stop his fund-raising activities in the U.S. until Marzook arrived in the country. *See id.* Baker replied that he had no objection to Marzook resolving HLF's conflict with Al-Aqsa. *See id.*

c. HLF Funds Hamas-Controlled Entities

Third, the administrative record establishes that, since 1992, HLF has made significant contributions to charitable organizations that the Government identifies as controlled or operated by Hamas. Specifically, HLF grant lists reveal that, between 1992 and 1999, HLF contributed approximately 1.4 million dollars to eight Hamas-controlled "zakat" (or charity) committees. *See* A.R. 1435-36, 86-87, 939-41, 1267. HLF grant lists also establish that, between 1992 and 2001, HLF gave approximately five million dollars to seven other Hamas-controlled charitable organizations, including a hospital in Gaza. *See* A.R. 87-91, 97-98, 100-05, 304-05, 307, 609-29, 732, 815, 843, 856, 858-60, 1127-40, 1143, 1162, 1165-68, 1204, 1209-11, 1253-55, 1796-2000.[20]

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[20] The record contains evidence that the political, as opposed to military, activities of Hamas include a broad network of charitable organizations including zakat committees, hospitals, schools, and

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In many instances, the Israeli Government provided the information that the charitable organizations HLF funds are controlled by Hamas. HLF contests OFAC's reliance on this information from the Israeli government.

However, agency designations can be based on a broad range of evidence including news reports, intelligence data, and hearsay declarations. *See National Council of Resistance of Iran v. Department of State,* 251 F.3d 192, 196 (D.C. Cir. 2001). Moreover, the D.C. Circuit has very recently upheld an agency decision based primarily on foreign governments' intelligence reports. In *32 County Sovereignty Comm. v. Dep't of State,* the Court of Appeals found that the administrative record supported the Secretary of State's determination that petitioners were "foreign terrorist organizations" under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), even though the Secretary relied primarily on intelligence reports provided by the British and Irish governments. 2002 WL 1300020 (D.C. Cir. June 14, 2002). Accordingly, it was reasonable for OFAC to rely on the intelligence information provided by the Israeli government.

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institutions. This charitable component is an effective way for Hamas to maintain its influence with the public, indoctrinate children and recruit suicide bombers. Moreover, there is evidence that Hamas' charitable organizations "serve[ ] as a screen for its covert" component, thereby permitting the transfer of funds to its terrorist activities. *See* A.R. 1916-17. Accordingly, "it is not always possible to distinguish between the 'innocent' activity of the charity associations and the funding of covert, subversive and terrorist activity." *See* A.R. 1916-17, 1502. To that end, both President Bush and President Clinton have designated all of Hamas as a terrorist organization, and determined that even charitable contributions to Hamas impair the "ability to deal with the national emergency." E.O. 13224 § 4; E.O. 12947 § 3.

d. HLF Provides Financial Support to Orphans and Families of Hamas Martyrs and Prisoners

Fourth, the administrative record contains evidence that HLF has provided financial support to the orphans and families of martyred[21] or imprisoned Hamas activists. The majority of this evidence consists of documents recovered from HLF's offices and reports compiled by the Israeli government concerning the recovered documents. Specifically, the administrative record contains the following HLF documents: a binder entitled "Orphans Sponsorship Program, Gaza in July 1999;" 1992 sponsorship forms for needy families; and two letters written by HLF employees. The record also contains two reports prepared by the Israeli government, dated September 20, 1995 and June 5, 1995.[22]

The 1999 Orphans Sponsorship Program binder lists the cause of death of each of the orphan's fathers, specifically distinguishing between "killing," "martyr," "sickness," and other causes of death. *See* A.R. 1501, 1801-1911. Approximately seventy-seven of the four hundred and forty four orphans in the binder are represented to be children of "martyrs." *See* A.R. 1801-1911.

With respect to HLF's 1992 sponsorship forms for needy families, a space on the form for social worker

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[21] As addressed below, HLF vigorously contests OFAC's interpretation of the term "martyr."

[22] HLF vigorously objects to OFAC's reliance on the Israeli government's reports. However, as addressed in *supra* Part III.B.5.c., it was reasonable for OFAC to rely on such information.

comments indicates that, in nearly every case, the applicant's parent or guardian was either jailed by the Israeli government for security reasons or martyred. *See* A.R. 1536-1790.

The two letters from HLF employees request the nomination of children and families of martyrs. Specifically, the August 13, 1992 letter from HLF employee Haitham Maghawri states "please nominate a few names of the Martyr's children with a summary on each childs [sic] situation, and how cooperative they are." A.R. 1501, 1791. The second letter, which is not dated, from HLF employee Ibrahim Khalil states: "We asked you for 40 applications forms for needy families from several regions to be sent ASAP, families of the martyrs, if possible would be good." A.R. 1501, 1793-94.

The September 20, 1995 report prepared by the Israeli government is based on that government's analysis of documents it recovered from HLF's Jerusalem office. The recovered documents show funds transferred from HLF to the Islamic Relief Agency[23] for distribution and includes the list of people supported by those funds. The report indicates that people who were not demonstrably connected to Hamas activists received lower payments when compared to those with known Hamas connections. *See* A.R. 78-79, 1285-1396. Finally, the Israeli government's June 5, 1995 report indicates that "some hundred orphans receiving support have been checked" and the "families of

[23] The Islamic Relief Agency was closed by the Israeli government in 1996 for providing support to the families of Hamas activists involved in terrorist attacks in Israel. *See* A.R. 101-02, 1127-40.

several orphans are directly connected with Hamas." A.R. 739.

Plaintiff vigorously contests OFAC's interpretation of the term "martyr" ("shaheed" in Arabic) in its fund solicitations. To that end, Baker, HLF's Chief Executive Officer, submitted a declaration to OFAC contending that HLF's use of that term was not intended to refer to terrorists or suicide bombers. Rather, Baker contends that "martyr" refers to "[a]nyone who died an 'innocent' death under a variety of circumstances. . . . it is hard to imagine a person who has died in Palestine other than by natural causes, that I would not consider to be 'shaheed.'" Baker Decl. ¶ 22, Pl.Ex. 1.[24]

In light of all of the evidence before OFAC regarding the relationship between HLF and Hamas, it was reasonable for the agency to determine that Baker's explanation was not credible. OFAC's rejection of HLF's definition of "martyr" is further supported by the fact that the 1999 Orphans Sponsorship Program binder does not differentiate between "innocent" and "natural death," as one would expect given HLF's definition of "martyr." Instead, the binder differentiates between a variety of causes of death, including "martyr," "natural death," "illness," "accident," "killing," and "electric shock."[25]

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[24] Although HLF also submitted a declaration by an investigator who investigated the causes of death of the fathers listed as "martyrs" in the 1999 Orphans Sponsorship Program binder, that declaration was not before the agency when it made its determination, is not part of the administrative record, and therefore cannot be considered by the Court.

[25] HLF also contests OFAC's determination on the ground that, according to the Government's own evidence, only a very small portion

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e. HLF's Jerusalem Office Supported Hamas

Fifth, there is evidence in the record that HLF's Jerusalem office supported Hamas. The Israeli government closed the office in May 1995, because it was "used for overseeing the channeling of funds to families of Hamas activists who had committed terrorist attacks and for families of Hamas prisoners." A.R. 1305, 1337. The closing was later upheld by the Israeli Supreme Court. *See* A.R. 1360-96.

Moreover, in 1997, the Israeli government arrested Mohammad Anati, the former head of HLF's Jerusalem office, because of his Hamas activities. *See* A.R. 82, 1263. The administrative record contains an Israeli intelligence report summarizing Anati's police interrogations subsequent to his arrest. The report indicates that Anati admitted to being a Hamas activist, and stated that, although HLF provided aid to the needy, some of that money was channeled to Hamas. *See* A.R. 1261, 1266-67, 1278.[26]

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of HLF's donations was made to families of martyrs. This argument is addressed *infra*.

[26] HLF vigorously opposes OFAC's reliance on Anati's confession because (1) the statements were likely given after he had been tortured by the Israeli police; and (2) the Israeli summary of his statements is incomplete, misleading, and does not contain the exculpatory statements that are included in the translations of his statements.

First, it was reasonable for OFAC to rely on information derived from Israeli police interrogations, despite HLF's contention about the prevalence of torture by the Israeli police. In determining whether to consider factual statements made to a foreign police officer, courts consider the totality of circumstances to determine whether the statements are reliable. *See United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972) (courts must consider totality of the circumstances to

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f. Unidentified FBI Informants Reported That HLF Funds Hamas

Sixth and finally, the administrative record contains reports from eight unidentified FBI informants. The informants' statements generally recount instances in which HLF leaders stated that HLF funds and supports Hamas.[27]

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determine whether a statement was voluntary); *In re Extradition of Atta,* 706 F.Supp. 1032, 1052 (E.D.N.Y. 1989) (in extradition proceeding, accomplices' statements supported probable cause finding, despite allegations that statements were the product of torture, because there was no evidence the statements were coerced or unreliable, the statements had factual detail, were not recanted, and were corroborated). In this case, Anati's statements are corroborated by other evidence in the record.

Second, as addressed in *supra* Part III.A., the translations of Anati's statements were not before OFAC when it made its determination, and are therefore not part of the administrative record. Moreover, as addressed in *supra* Part III.B.5.c., it was reasonable for OFAC to rely on the Israeli intelligence report.

Third, even if the translations of Anati's statements were part of the administrative record, they would not advance Plaintiff's argument. HLF not only failed to provide any evidence that Anati was tortured, but Anati's lawyer, an eminent civil rights attorney, did not elicit testimony from him at his plea hearing that he was tortured. Indeed, Anati testified during that hearing that his confessions to the police were "generally true." *See* Pl.Ex. R-1 at 1. Accordingly, it was reasonable for OFAC to rely on the police interrogations to inform its administrative decision.

[27] HLF contests OFAC's reliance on these statements because the Government did not provide any basis to believe they are reliable, did not describe the basis for the informants' knowledge, and did not include any versions of their statements in the unclassified administrative record.

However, courts have recognized the usefulness of information from confidential sources when presented in combination with corroborating evidence. *See United States v. Bruner,* 657 F.2d 1278, 1297 (D.C. Cir.

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g. The Administrative Record As A Whole Supports OFAC's Action

As noted above, the scope of judicial review under the APA "arbitrary and capricious" standard is deferential, and the Court must affirm the agency's decision as long as it is supported by a rational basis.

In this case, the evidence in the administrative record provides ample support for OFAC's conclusion that HLF acts for or on behalf of Hamas. Specifically, there is evidence that HLF had financial connections to Hamas; that HLF and Hamas leaders not only had substantial involvement with one another, but also that an HLF officer agreed to take direction from a senior Hamas activist; and that HLF has provided financial support to Hamas-controlled organizations and to Hamas martyrs and prisoners.

When the Court reviews all of the evidence in the administrative record as a whole, as it must, it is clear that OFAC's decision meets the "minimal standards of rationality," and therefore must be upheld. *Small Refiner Lead Phase-Down Task Force,* 705 F.2d at 521. Plaintiff's arguments challenging the reasonableness of OFAC's

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1981) (finding that magistrate judge properly concluded that informants' credibility was sufficiently established because informants' statements were corroborated and they had provided reliable information in the past). Here, there are eight corroborating and independent sources, in addition to the corroborating evidence detailed above. Further, the FBI indicated that the sources had been reliable in the past (admitting that one source had been both reliable and unreliable), and provision of such information supports OFAC's consideration of their statements. *See id.* at 1297.

determination do not alter the Court's analysis for the following reasons.

First, the heart of HLF's argument is that much of the evidence in the record involves HLF's association with Hamas prior to its designation as a terrorist organization in 1995. HLF reasons that, because the pre-1995 activities were legal, and because the record contains substantially less post-1995 evidence, the administrative record does not support OFAC's determination that HLF acts for or on behalf of Hamas.

Even if HLF were correct that the majority of evidence in the record directly connecting HLF to Hamas involves pre-1995 activities – and the Court is not making that finding – the outcome would not change. HLF does not contend that the pre-1995 evidence may not be considered in evaluating the reasonableness of the agency's action. Certainly, the agency itself may consider the genesis of HLF and the totality of its history. Upon review of the entire administrative record, it is clear that the agency's reliance on pre-1995 evidence does not render its final determination arbitrary and capricious.

Finally, when the pre-1995 evidence is combined with the post-1995 evidence that HLF continued to be controlled by the same individuals who were directly affiliated with Hamas prior to 1995, that HLF continued to fund Hamas-controlled entities and the orphans and families of Hamas martyrs and prisoners, that HLF's Jerusalem office was closely allied with Hamas, and that FBI informants confirmed the funding connection between HLF and

Hamas, it was eminently reasonable for OFAC to conclude that HLF continued to act on behalf of Hamas.[28]

Second, HLF contends that much of the post-1995 evidence does not support OFAC's determination. Specifically, HLF argues that, according to the Government's own evidence, only a very small portion of HLF's donations was made to families of martyrs. HLF also contends that numerous other organizations, including official government entities, contribute to the same zakat committees that HLF funds. What differentiates these organizations from HLF is that they do not have the same connections and association with Hamas that HLF has.

Moreover, the purpose of the Court's inquiry is not to determine whether each and every piece of evidence in the record independently supports OFAC's determination. Nor is it to second-guess the agency on credibility issues or issues involving the Executive Branch's expertise in the area of foreign affairs. *See Regan v. Wald,* 468 U.S. 222, 242 (1984). Rather, its function is to conduct a careful review of the entire administrative record and assess whether it demonstrates a reasonable basis for the

[28] HLF also contests OFAC's determination because the Government knew about HLF's alleged connection to Hamas since it was designated as a terrorist in 1995 and failed to take any action against HLF for nearly six years. However, the duration of the Government's knowledge is irrelevant to the Court's determination of whether the agency's action was reasonable. Executive Branch decisions to designate an entity as a terrorist are complex and involve significant political ramifications. Accordingly, the Court must defer to the Executive's discretion on the timing of those foreign policy and national security decisions.

agency's action. In this case, the administrative record as a whole supports OFAC's determination.

In summary, for all the forgoing reasons, the Court concludes that OFAC's determination that HLF acts for or on behalf of Hamas is supported by substantial evidence in the administrative record and was not arbitrary and capricious. In short, Defendants have not violated the APA.

C. The Constitutional and RFRA Claims

In addition to challenging agency action under the APA, HLF also contends that its designation as a terrorist and the attendant blocking order violate (1) the Due Process Clause of the Fifth Amendment; (2) the Takings Clause of the Fifth Amendment; (3) the Fourth Amendment; (4) First Amendment rights to freedom of speech and association; and (5) the Religious Freedom Restoration Act. The Government has moved to dismiss each of these claims.

For the reasons stated below, the Court concludes that Plaintiff has failed to state a claim under the Fifth and First Amendments and under the Religious Freedom Restoration Act. Plaintiff has, however, sufficiently stated a claim for violation of its Fourth Amendment rights.

1. Motion to Dismiss Standard of Review

For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plain statement of the claim and the grounds on which it rests. Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson,* 355 U.S. 41, 47 (1957). A motion to dismiss under Rule 12(b)(6) tests whether the

plaintiff has properly stated a claim, not whether the plaintiff will prevail on the merits. Fed. R. Civ. P. 12(b)(6); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). In deciding such a motion, the court must accept all of the Complaint's well-pled factual allegations as true and draw all reasonable inferences in the nonmovant's favor. *Scheuer,* 416 U.S. at 236.

2. Due Process

Plaintiff argues that OFAC's designation of HLF as an SDT and SDGT, resulting in the blocking of its assets, violates the Due Process Clause of the Fifth Amendment. First, HLF contends that OFAC failed to provide pre-designation notice and a hearing in violation of its procedural due process rights. Second, HLF argues that OFAC violated its substantive due process rights by acting arbitrarily and capriciously. For the reasons discussed below, both of these arguments fail.

a. Procedural Due Process

The due process clause generally requires the Government to afford notice and a meaningful opportunity to be heard before depriving a person of certain property interests. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 62 (1993); *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). In this case, it is undisputed that the Government failed to provide HLF any notice or hearing prior to designating it as a terrorist and blocking its

assets.[29] For the following reasons, the Government's actions did not, however, violate HLF's right to due process.

HLF relies principally on *National Council of Resistance of Iran v. Department of State,* 251 F.3d 192 (D.C. Cir. 2001) (*"NCRI"*), in which the D.C. Circuit held that notice and an opportunity to be heard must be afforded prior to designating an entity as a "foreign terrorist organization" under the AEDPA. However, *NCRI* does not control this case. Here, the agency action was taken pursuant to the IEEPA-based sanctions program. Action under that program flows from a Presidentially declared national emergency. Thus, this case differs significantly from *NCRI* where neither a declaration of war (as required by the TWEA) nor a Presidentially declared national emergency (as required by the IEEPA) existed to justify the absence of notice and an opportunity to be heard.

The Supreme Court has outlined what circumstances "present[ ] an 'extraordinary' situation in which postponement of notice and hearing until after seizure d[oes] not deny due process." *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679-80 (1974). To that end, the Government must satisfy the following requirements: (1) the deprivation was necessary to secure an important governmental interest; (2) there has been a special need for very prompt action; and (3) the party initiating the

[29] As noted above, on May 31, 2002, the Government redesignated HLF as an SDT and SDGT. The Government did provide HLF notice and an opportunity to be heard prior to the redesignation, and that procedure is therefore not the subject of the procedural due process claim.

deprivation was a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. *Id.* at 678.

First, the OFAC designation and blocking order served the important government interest, set forth in the Executive Orders issued by President Bush and President Clinton, of combating terrorism by cutting off its funding. *See Haig v. Agee,* 453 U.S. 280, 307 (1981). At the time of HLF's designation, less than three months had passed since the September 11, 2001 terrorist attacks on United States soil; President Bush had recently declared a national emergency in Executive Order 13224 to deal with the threat of future attacks and the need to curtail the flow of terrorist financing; President Clinton had issued Executive Order 12947 finding that the acts of violence committed by terrorists disrupting the Middle East peace process constituted an extraordinary threat to the United States; and the violence in the Middle East was escalating.

Second, prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order. Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless. Indeed, in issuing the Executive Order, President Bush explicitly determined that, "because of the ability to transfer funds or assets instantaneously, prior notice to such [designated] persons of measures to be taken pursuant to this order would render these measures ineffectual." E.O. 13224 § 10; *see Global Relief Foundation, Inc. v. O'Neill,* 2002 WL 1285829, at *22 (N.D. Ill. June 11,

2002) ("[p]re-deprivation notice would, in fact be antithetical to the objectives of [the IEEPA] sanctions program[]"); *Milena Ship Mgmt. Co. Ltd. v. Newcomb,* 804 F.Supp. 846, 854 (E.D. La. 1992) (finding that OFAC had to act quickly because "delay would have allowed the assets to leave the United States, thereby thwarting the purpose of the [Executive] Orders").

Third and finally, government officials, and not private parties, initiated the blocking action. OFAC did so pursuant to the IEEPA and two Executive Orders that specifically authorize such action in limited circumstances.

In sum, for the foregoing reasons, the Court concludes that, accepting all of Plaintiff's factual allegations as true, it has not stated a claim for violation of its procedural due process rights.

b. Substantive Due Process

As noted above, HLF also argues that OFAC violated its right to substantive due process by acting arbitrarily and capriciously in designating it as a terrorist and blocking its assets.[30]

This due process challenge must also fail. The Court has determined that OFAC's designation of HLF and blocking of its assets was not arbitrary and capricious under the APA. *See supra* Part III.B. Accordingly, it [sic] clear that the agency action did not rise to the level of a constitutional violation.

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[30] The parties devoted little attention to this claim in their briefs.

3. Taking Without Just Compensation

Plaintiff next argues that the blocking of its assets constitutes an uncompensated taking, in violation of the Takings Clause of the Fifth Amendment.[31] The Government argues, first, that the Court lacks jurisdiction to consider this claim, and second, that a blocking order does not, as a matter of law, constitute a taking.

While it is very doubtful that the Court has jurisdiction,[32] even if it did, the takings claim would fail. The case law is clear that blockings under Executive Orders are temporary deprivations that do not vest the assets in the Government. Therefore, blockings do not, as a matter of law, constitute takings within the meaning of the Fifth Amendment. Accordingly, courts have consistently rejected these claims in the IEEPA and TWEA context. *See Propper v. Clark,* 337 U.S. 472 (1949) (blocking is not a taking because it is a temporary action); *Tran Qui Than v. Regan,* 658 F.2d 1296, 1301 (9th Cir. 1981) (rejecting takings claim because blocking under TWEA is not equivalent to vesting); *Global Relief Foundation, Inc. v. O'Neill,* 2002 WL 1285829, at *19 (N.D. Ill. June 11, 2002) (finding plaintiff unlikely to succeed on merits of takings claim because IEEPA blocking is temporary); *IPT Co., Inc. v. Dep't of Treasury,* 1994 WL 613371, at *5-6 (S.D.N.Y. Nov.

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[31] The Takings Clause forbids the Government from taking private property for public use without just compensation. U.S. Const. amend. V.

[32] Pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department. . . ."

4, 1994), Def. Ex. E (denying takings claim for IEEPA blocking because blocking is a temporary deprivation). Accordingly, it is clear that, as a matter of law, the blocking order in this case is a temporary deprivation that does not constitute a constitutionally cognizable taking.

Plaintiff may, however, some day have a credible argument that the long-term blocking order has ripened into a vesting of property in the United States. At this stage, HLF's assets have only been blocked for eight months, and it is premature to determine that the temporary deprivation is equivalent to a vesting. It is clear, then, that the current deprivation has not "go[ne] too far," so as to constitute a taking, even though Plaintiff may some day have a more viable claim. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 122 S.Ct. 1465, 1480 (2002); *E-Systems, Inc. v. U.S.,* 2 Cl. Ct. 271, 274-78 (Cl. Ct. 1983) (denying motion for summary judgment on takings claim).

Accordingly, the Court concludes that, as a matter of law, the blocking order does not presently constitute an actionable Fifth Amendment taking.

4. Fourth Amendment

HLF further argues that the Government violated its Fourth Amendment rights.[33] Specifically, HLF contends that OFAC's freezing of its bank accounts constitutes an

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[33] The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

unlawful seizure. Plaintiff also alleges that the Government conducted an unlawful search and seizure by entering its offices, searching them, and removing its documents, office equipment, and other assets without a warrant. It is undisputed that the Government did not obtain a warrant prior to initiating these actions. For the following reasons, the Court concludes that HLF has not stated a Fourth Amendment claim with respect to the freezing of its accounts. However, HLF has stated a claim based on the Government's entry onto its corporate premises and removal of its property without a warrant.

With respect to the freezing of HLF's accounts, the Government contends that its actions do not constitute a seizure within the meaning of the Fourth Amendment. The Government plainly had the authority to issue the blocking order pursuant to the IEEPA and the Executive Orders and the Court has determined that its actions were not arbitrary and capricious. Further, the case law is clear that a blocking of this nature does not constitute a seizure. *See Tran Qui Than,* 658 F.2d at 1301 (blocking under TWEA is not equivalent to vesting); *D.C. Precision Inc. v. US,* 73 F.Supp.2d 338, 343 n.1 (S.D.N.Y. 1999) (assets blocked by the government are not seized); *Cooperativa Multiactiva de Empleados de Distribuidores de Drogas v. Newcomb,* Civ. No. 98-0949, slip op. at 13-14 (D.D.C. Mar 29, 1999), Def. Ex. F (blocking bars transactions but does not confiscate property and is not tantamount to a forfeiture); *IPT Co.,* 1994 WL 613371, at *5-6 (IEEPA blocking is a temporary freezing and title does not vest in the government); *Can v. US,* 820 F.Supp. 106, 109 (S.D.N.Y. 1993) (TWEA blocking does not constitute a vesting merely because it remained in place for a lengthy period of time).

Accordingly, the freezing of HLF's accounts is not a seizure entitled to Fourth Amendment protection.

However, the Government's entry into HLF's offices, search of its property, and seizure of its documents and office equipment without a warrant, do raise significant Fourth Amendment concerns. Indeed, these allegations state a classic Fourth Amendment violation. *See G.M. Leasing Corp. v. United States,* 429 U.S. 338, 353-59 (1977) (holding that government entry into business premises without a warrant violated the Fourth Amendment).

The Government's arguments to the contrary are not persuasive. First, the Government relies heavily on the nature of its authority pursuant to the IEEPA and the Executive Orders. It reasons that, because the IEEPA expressly allows the freezing of assets, a warrant requirement does not comport with the statutory framework. In support of this contention, the Government argues that OFAC has never sought a search and seizure warrant to effect a blocking, and that procedure has never been required under the IEEPA. The argument is unpersuasive, however, because no court has ever directly addressed the issue.

Moreover, the Government relies on a case that supports the contrary conclusion. In *Global Relief Foundation, Inc. v. O'Neill,* 2002 WL 1285829, at *25 (N.D. Ill. June 11, 2002), the Court evaluated the constitutionality of a similar search and seizure under the IEEPA. The court concluded that the government did not violate the

Fourth Amendment precisely because it had obtained a warrant pursuant to the Foreign Intelligence Surveillance Act ("FISA")[34] and because FISA's safeguards provided sufficient protection for the rights guaranteed by the Fourth Amendment.[35] In this case, the Government has offered no excuse for failing to follow the same procedure by obtaining a warrant from the Foreign Intelligence Surveillance Court to establish the requisite probable cause to enter HLF's corporate premises and remove its property. Its failure to do so, or to otherwise establish the necessary probable cause, states a claim for violation of HLF's Fourth Amendment rights.

Second, the Government contends that a warrant was not necessary because statutory authorization to search or seize supported by an important government interest and

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[34] FISA was enacted in 1978 to create a "secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights." S. Rep. No. 95-604, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916. To oversee the Executive's exercise of powers granted by FISA, the statute established the Foreign Intelligence Surveillance Court to review applications for authorization of electronic surveillance aimed at obtaining intelligence information. *See* 50 U.S.C. § 1803. In 1994, FISA was amended to give the Foreign Intelligence Surveillance Court jurisdiction to hear applications for physical searches as well as electronic searches. *See id.* § 1804(a).

[35] It is true that the government in *Global Relief* did not obtain the warrant prior to entering plaintiff's premises and seizing its property. However, FISA permits a warrantless search in emergency situations, and authorizes the government to submit a warrant application to the Foreign Intelligence Surveillance Court within 72 hours of the warrantless search. In *Global Relief,* the government submitted the warrant application within the requisite time period, and it was approved by the Foreign Intelligence Surveillance Court.

adequate safeguards of fairness, may substitute for a warrant or probable cause determination. *See Donovan v. Dewey,* 452 U.S. 594, 599 (1981); *New York v. Burger,* 482 U.S. 691, 702 (1987); *United States v. Biswell,* 406 U.S. 311, 315-16 (1972). The Government is correct that the Supreme Court has delineated this narrow exception in the context of administrative inspections in regulated industries.

However, even if the administrative search exception for commercial entities was analogous to the present factual context, which it is not, a fundamental component of the exception cannot be met in this case. In upholding the warrantless searches, the Supreme Court specifically concluded that the regulatory inspection statutes in question provide a "sufficiently comprehensive and predictable inspection scheme. . . . that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan,* 452 U.S. at 600. In this case, neither the IEEPA nor the two Executive Orders provides these essential safeguards of predictability and implicit notice that satisfy the requirements of the Fourth Amendment.

In sum, the Court concludes that HLF has sufficiently stated a Fourth Amendment violation based on the Government's physical entry onto its premises and removal of its property without a warrant. HLF has not, however, stated a claim as to the freezing of its assets, which does not constitute a Fourth Amendment seizure.

5. First Amendment

HLF next argues that the Government has violated the First Amendment by prohibiting it from making any humanitarian contributions.[36] Specifically, HLF contends that its designation as a terrorist organization and the blocking order violate its First Amendment rights to freedom of association and speech. For the reasons discussed below, both of these arguments fail.

a. Freedom of Association

HLF contends that the designation and blocking order are unconstitutional under *NAACP v. Claiborne Hardware Co.*, because the Government has imposed guilt by association and because it has failed to establish that HLF has a "specific intent to further [Hamas'] illegal aims." 458 U.S. 886, 919 (1982). Each of these arguments is unpersuasive.

First and foremost, this is simply not a case like *Claiborne Hardware,* because OFAC's action was not taken against HLF for "reason of association alone." *Id.* at 920. In *Claiborne Hardware,* the Supreme Court reversed a state tort judgment against the National Association for the Advancement of Colored People and members of that organization who had participated in a seven-year boycott of white merchants. The Supreme Court found that liability had been unconstitutionally imposed "by reason of association alone." *Id.* at 920.

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[36] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I.

In this case, the IEEPA, the two Executive Orders, and the blocking order do not prohibit membership in Hamas or endorsement of its views, and therefore do not implicate HLF's associational rights. Instead, they prohibit HLF from providing financial support to Hamas, "and there is no constitutional right to facilitate terrorism." *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1133 (9th Cir. 2000) (AEDPA does not impose guilt by association because the statute does not prohibit membership in the designated groups and merely prohibits financial contributions to those groups). Accordingly, the Government has not imposed guilt by association and the agency's action is not unconstitutional pursuant to *Claiborne Hardware.*

Second, the First Amendment does not require the Government to establish that HLF had a "specific intent" to further Hamas' unlawful aims. The *Claiborne Hardware* court imposed the specific intent requirement on Government restrictions that impose liability on the basis of association alone – classic First Amendment activity. Because the Government in this case has not imposed guilt by association, the *Claiborne Hardware* specific intent requirement is not applicable.

Moreover, imposing a "specific intent" requirement on the Government's authority to issue blocking orders would substantially undermine the purpose of the economic sanctions programs. Regardless of HLF's intent, it can not effectively control whether support given to Hamas is used to promote that organization's unlawful activities. *Humanitarian Law Project,* 205 F.3d at 1133 (First Amendment does not require the government to demonstrate a specific intent to aid an organization's illegal aims because "[m]aterial support given to a terrorist organization can be

used to promote the organizations's unlawful activities, regardless of donor intent").

In sum, accepting all of HLF's factual allegations as true, it is clear that HLF has not established any interference with its associational rights.

b. Freedom of Speech

As noted above, HLF also contends that the Government violated its First Amendment right to freedom of speech by prohibiting it from making any humanitarian donations. HLF's humanitarian contributions clearly implicate both speech and nonspeech elements. Accordingly, pursuant to *United States v. O'Brien,* "a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. 367, 376 (1968); *see also Global Relief Foundation, Inc. v. O'Neill,* 2002 WL 1285829, at *24 (N.D. Ill. June 11, 2002) (applying *O'Brien* standard to deny preliminary injunction for free speech challenge to IEEPA asset freeze); *Humanitarian Law Project,* 205 F.3d at 1135-36 (declining to apply strict scrutiny to AEDPA material support restriction because restriction was not aimed at expressive component of conduct).[37]

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[37] HLF argues that the Government's restriction of HLF's freedom of speech requires strict scrutiny under *Buckley v. Valeo,* 424 U.S. 1 (1976), and its progeny. However, *Buckley* involved restrictions on political contributions, which implicate the core First Amendment right of political expression in a democratic society. *See Buckley,* 424 U.S. at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government

(Continued on following page)

Applying the familiar four-part test laid out in *O'Brien,* the Government's restriction passes intermediate scrutiny if (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 376-77.

In this case, the Executive Orders and blocking order clearly meet these requirements. First, President Bush and President Clinton plainly had the power to issue the Executive Orders pursuant to the IEEPA. Moreover, the IEEPA and the Executive Orders provide OFAC with the authority to designate HLF and block its assets.

Second, as addressed in *supra* Part III.C.2.a., the Executive Orders and OFAC's actions promote an important and substantial government interest – that of combating terrorism by undermining its financial base.

Third, the Government's interest in preventing terrorist attacks is unrelated to suppressing free expression. As addressed above, the Government has merely restricted HLF's ability to provide financial support to

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established by our Constitution. The First Amendment affords the broadest protection to such political expression. . . . "). In this case, HLF does not contend that it has made contributions to political organizations or that its contributions are a means of political expression or advocacy. Instead, HLF asserts that its contributions involve "charitable and humanitarian aid." Compl. ¶ 6. Such charitable contributions plainly do not involve political expression, and therefore do not warrant strict scrutiny under *Buckley*.

Hamas. It has not restricted HLF's ability to express its viewpoints, even if these views include endorsement of Hamas.

Fourth and finally, this incidental restriction is no greater than necessary to further the Government's interest. Money is fungible, and the Government has no other, narrower, means of ensuring that even charitable contributions to a terrorist organization are actually used for legitimate purposes.[38] *See Humanitarian Law Project,* 205 F.3d at 1136 (finding that AEDPA material support restriction is no greater than necessary because money is fungible and even contributions earmarked for peaceful purposes can be used by terrorist organizations for unlawful purposes); *Farrakhan v. Reagan,* 669 F.Supp. 506, 512 (D.D.C. 1987) (dismissing free speech claim because "[i]n the face of the national security interests lying behind the [IEEPA] sanctions regulations, . . . there is no alternative that would allow organizations to speak through contributions while still allowing the government to effectuate its legitimate and compelling interests in national security"). Accordingly, the Government's restriction in this case is narrowly enough tailored to only further its interest in stopping the flow of American dollars to Hamas.

In sum, OFAC's designation of HLF and attendant blocking order satisfy scrutiny under the *O'Brien* test, and therefore do not violate HLF's First Amendment right to freedom of speech.

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[38] Even if the contributions could be limited to charitable purposes only, non-HLF contributions would be freed up for funding of terrorist activities.

6. Religious Freedom Restoration Act and Free Exercise Clause

Finally, HLF contends that the designation and blocking order substantially burden HLF's exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"). HLF also invokes the free exercise rights of its Muslim employees and donors. Both arguments fail as a matter of law.

a. Substantial Burden on HLF's Exercise of Religion

RFRA prevents the Government from placing a "substantial burden" on the exercise of religion "even if the burden results from a rule of general applicability," unless the Government demonstrates a "compelling government interest" and that it has used the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(a), (b). The Court need not address the second and third steps of this inquiry because, accepting all of HLF's factual allegations as true, it has failed to meet its burden of showing that an exercise of its religion has been substantially burdened.

Other than conclusory statements of burdensomeness, HLF makes only two references in its Complaint to its own actual exercise of religion. HLF asserts that "Holy Land's work . . . fulfills [its] religious obligations as Muslims to engage in zakat . . . [which] is one of the Five Pillars (fundamental tenets) of the Muslim religion." Compl. ¶ 53. HLF also states that "Holy Land's use of . . . donations [from its Muslim donors and employees] for charitable and humanitarian purposes, constitute the 'exercise of religion' under [RFRA]." Compl. ¶ 58.

Accepting these factual allegations as true, they simply do not describe any exercise of religion that has been burdened. Although charitable activities may constitute religious exercise if performed by religious believers for religious reasons, HLF has not established that, as an organization, it made these charitable contributions as an exercise of its own religious beliefs. Indeed, nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, HLF defines itself as a "non-profit charitable corporation," without any reference to its religious character or purpose.[39] Compl. ¶ 5.

In sum, Plaintiff's own factual allegations do not identify any exercise of religion that could serve as the basis for a RFRA claim. Accordingly, HLF does not, as a matter of law, state a viable RFRA claim on its own behalf. As the following analysis demonstrates, neither does HLF raise a viable free exercise claim on behalf of its Muslim donors or employees.

b. Free Exercise Rights of HLF's Muslim Employees and Donors

In addition to arguing that its own right to freedom of religion was violated by the Government's actions, HLF also invokes the free exercise rights of its Muslim donors and employees. HLF reasons that, pursuant to *Hunt v. Washington State Apple Advertising Commission,* it has "associational standing" to raise these claims because (1)

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[39] Significantly, in its 501(c)(3) application to the I.R.S. for tax exemption, HLF described itself as a charitable, not a religious or Muslim, organization.

its donors and employees "would otherwise have standing to sue in their own right;" (2) the interests HLF seeks to protect are "germane to [its] purpose" as a Muslim charity; and (3) "neither the claim asserted nor the relief requested requires the participation of individual [donors and employees] in the lawsuit." 432 U.S. 333, 343 (1977).

It is clear that Plaintiff has failed to meet these *Hunt* requirements. With respect to the third inquiry, the Supreme Court has stated that free exercise claims are precisely the type of claims that require individual participation in order to show the alleged burdensome effect of an enactment on an individual's religious practice. *See Harris v. McRae,* 448 U.S. 297, 321 (1980) ("[s]ince 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,' the [free exercise claim] is one that ordinarily requires individual participation") (citations omitted). Accordingly, the individual participation of HLF's employees and donors is necessary to establish any burden on their religious practice, and HLF has therefore not met the third *Hunt* factor.

HLF has further failed to establish that it has associational standing because it does not contend that there is any genuine obstacle preventing its donors or employees from asserting their own free exercise rights. *See Singleton v. Wulff,* 428 U.S. 106, 116 (1976).

Therefore, as a matter of law, HLF does not have associational standing to invoke the free exercise rights of its Muslim donors and employees.

E. Preliminary Injunction

HLF has moved for a preliminary injunction. In order to prevail on this motion, Plaintiff must demonstrate (1) a substantial likelihood of success on the merits; (2) that it will be irreparably injured if an injunction is not granted;[40] (3) that an injunction will not substantially injure the Government; and (4) that the public interest will be furthered by the injunction. *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1505-06 (D.C. Cir. 1995). HLF has not carried its burden for the following reasons.

First, Plaintiff has not demonstrated a substantial likelihood of success on its claims. Although the Court has ruled that HLF has stated a constitutional claim on its Fourth Amendment claim and will be afforded an opportunity to prove it, the Court is not prepared to determine that HLF has a substantial likelihood of success on those allegations in light of the strong arguments advanced by the Government in support of its position. As to Plaintiff's likelihood of success on the APA, RFRA, and remaining constitutional claims, the Court has already concluded that they have no merit.

Second, it is also clear that the injury to the Government and the public interest weigh against granting the preliminary injunction. Both the Government and the public have a strong interest in curbing the escalating violence in the Middle East and its effects on the security of the United States and the world as a whole. *Milena Ship Mgmt. Co. Ltd. v. Newcomb,* 804 F.Supp. 846, 854

[40] The Government concedes irreparable injury, and therefore the Court need not address that factor.

(E.D. La. 1992) (denying motion for preliminary injunction to unblock assets, despite showing of irreparable harm, because "[t]he public interest overarches all else because of the world backdrop against which OFAC's action was taken"). Blocking orders are an important component of U.S. foreign policy, and the President's choice of this tool to combat terrorism is entitled to particular deference.

In sum, the Court concludes that HLF does not have a substantial likelihood of success on the merits, and that the balance of harms and public interest weighs in favor of denying HLF's motion for a preliminary injunction.

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's Motion for a Preliminary Injunction, grants in part and denies in part Defendants' Motion to Dismiss and for Summary Judgment, and grants Defendants' Motion *In Limine* and to Strike. Defendants' Motion to Dismiss and for Summary Judgment is granted with respect to the APA, Fifth Amendment, First Amendment, and Religious Freedom Restoration Act claims. Defendants' Motion is denied with respect to the Fourth Amendment claim.

DATE

GLADYS KESSLER
UNITED STATES
DISTRICT JUDGE

Copies to:

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John W. Boyd
Nancy Hollander
Zachary A. Ives
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20 First Plaza, Suite 700
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Civil Division
901 E. Street, N.W.,
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Washington, DC 20004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT Plaintiff, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, *et al.* Defendants.	Civil Action No. 02-442 (GK)

ORDER

The matters now before the court are Plaintiff's Motion for a Preliminary Injunction [#3], Defendants' Motion to Dismiss and For Summary Judgment [#17], and Defendants' Motion *In Limine* and to Strike [#31]. Upon consideration of the motions, oppositions, replies, the arguments presented at the motions hearing on July 18, 2002, and the entire record herein, for the reasons discussed in the accompanying Memorandum Opinion, it is this ___ day of August 2002 hereby

ORDERED, that Plaintiff's Motion for a Preliminary Injunction is **denied**; it is further

ORDERED, that Defendants' Motion to Dismiss and for Summary Judgment is **granted in part and denied in part**; and it is further

ORDERED, that Defendants' Motion *In Limine* and to Strike is **granted**.

GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5307 **September Term, 2002**
02cv00442

Filed On: (Aug. 22, 2003)

Holy Land Foundation for
Relief and Development,
Appellant

v.

John D. Ashcroft, in his official
capacity as Attorney General
of the United States, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5307 **September Term, 2002**
02cv00442

Filed On: Aug. 22, 2003

Holy Land Foundation for Relief and Development,
Appellant

v.

John D. Ashcroft, in his official capacity as Attorney General of the United States, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed August 1, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT Last Address: 525 International Parkway Richardson, Texas 75081 Plaintiff, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, *et al.*, Defendants.	)	No. 1:02CV00442(GK)

FIRST AMENDED COMPLAINT OF THE HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Holy Land Foundation for Relief and Development ("Holy Land") brings this action under the United States Constitution, the Religious Freedom Restoration Act ("RFRA"), the International Emergency Economic Powers Act ("IEEPA"), and the Administrative Procedure Act ("APA"). Holy Land asks the Court to declare unlawful and enjoin defendants' designation and redesignation of Holy Land as a specially designated terrorist ("SDT") and as a specially designated global terrorist ("SDGT") and their seizure of Holy Land's assets on December 4, 2001.

2. Defendants designated Holy Land and seized Holy Land's assets, including millions of dollars of charitable donations, without notice, without a hearing, without a warrant, without probable cause, without statutory authority, without meaningful or adequate investigation, and without any rational basis. After this case began, defendants engaged in a sham redesignation process, based on an incomplete and skewed record, intended solely to advance the defendants' position in the litigation. The designation and redesignation of Holy Land and the seizure of Holy Land's assets, under a "blocking notice" issued by the Office of Foreign Assets Control ("OFAC"), an entity within the United States Department of the Treasury, violated Holy Land's rights under the First, Fourth, and Fifth Amendments to the Constitution; violated the rights of Holy Land, its donors, and its employees under RFRA; exceeded the authority granted to the President (and delegated by him to the defendants) under the IEEPA; constituted arbitrary and capricious agency action under the APA; and requires de novo factfinding under the APA because the adjudication of Holy Land's status as a purported terrorist organization was conducted with inadequate and biased factfinding procedures.

JURISDICTION

3. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1346(a)(2).

VENUE

4. Venue is proper in this district under 28 U.S.C. § 1391(e), because the defendants reside here.

PARTIES

5. Holy Land is an American foundation that has worked to foster peace and that opposes terrorism in any form. It is a non-profit charitable corporation organized in 1989 under the laws of California and with its principal place of business in Richardson, Texas. Until defendants' unlawful actions, Holy Land was a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code and derived its revenue from charitable, tax-deductible donations from individuals and institutions. Most donors to Holy Land are Muslims who give in accordance with, and as required by, their religious beliefs. Holy Land conducts its charitable and humanitarian activities in accordance with, and as required by, the principles of the Muslim religion.

6. Until the seizure of its assets on December 4, 2001, Holy Land provided charitable and humanitarian aid to refugees, orphans, victims of human and natural disasters, and other poor and needy persons and entities throughout the world, without regard to faith or political affiliation. Among its other charitable and humanitarian work, Holy Land has organized aid to victims of the September 11, 2001 terrorist attacks; it has provided assistance to victims and relief workers at the Oklahoma City bombing site; to victims of flooding in Oklahoma and Iowa; to victims of riots in Los Angeles; to tornado victims in Fort Worth; to the needy in Paterson, New Jersey; to earthquake victims in Turkey and India; to victims of the Bosnian and Kosovo conflicts; to victims of the conflict in Chechnya; to victims of flooding in Mozambique; and to refugees, orphans, and other persons and entities in need in the West Bank, Gaza, Lebanon, and Jordan.

7. Holy Land has often undertaken its charitable and humanitarian work in conjunction with governmental and nongovernmental international relief organizations, including the International Red Cross, the International Red Crescent, the United Nations High Commission for Refugees, the United Nations World Food Program, the North Atlantic Treaty Organization, the Royal Dutch Army, the Government of Turkey, the Salvation Army, the United Nations Relief and Works Agency for Palestinian Refugees in the Near East, the United Nations International Children's Emergency Fund, CARE International, and Catholic Relief Services.

8. Holy Land has never donated funds or provided services to Hamas or any other designated "foreign terrorist organization" ("FTO"), SDT, or SDGT. Holy Land has never donated funds or provided services for the purpose of supporting Hamas or any other designated FTO, SDT, or SDGT. Holy Land donates funds and provides services primarily to victims of man-made and natural disasters, based on need, without regard to faith or political beliefs or affiliations.

9. Neither Hamas nor any other designated FTO, SDT, or SDGT controls or has an interest in Holy Land. Neither Hamas nor any other designated FTO, SDT, or SDGT controls or has an interest in any of Holy Land's assets, including the blocked assets at issue in this case. No foreign person controls or has an interest in any of Holy Land's assets, including the blocked assets in this case, except for approximately $225,000 owed to foreign vendors for services and supplies provided to Holy Land for humanitarian use before the OFAC blocking notice was issued on December 4, 2001.

10. Defendant John Ashcroft is the Attorney General of the United States and the highest official in the United States Department of Justice. He is sued in his official capacity.

11. Defendant United States Department of Justice ("DOJ") is the principal law enforcement agency of the United States government. The DOJ includes the Federal Bureau of Investigation ("FBI"). The President has delegated to the DOJ certain aspects of his authority under the IEEPA, 50 U.S.C. §§ 1701-1707.

12. Defendant Paul H. O'Neill is the Secretary of the Treasury of the United States. He is sued in his official capacity.

13. Defendant United States Department of the Treasury ("DOT") is an agency to which the President has delegated certain aspects of his authority under the IEEPA. OFAC is an office within the DOT.

14. Defendant Colin L. Powell is the Secretary of State of the United States. He is sued in his official capacity.

15. Defendant United States Department of State is an agency to which the President has delegated certain aspects of his authority under the IEEPA.

ALLEGATIONS COMMON TO ALL COUNTS

16. Almost from the beginning of Holy Land's existence, the Government of Israel ("GOI") and its allies have alleged falsely that Holy Land provided funds and other assistance to Hamas. To counter these false allegations, Holy Land representatives repeatedly have sought

meetings with the defendant agencies. In most instances, defendants ignored these requests. When meetings did occur, representatives of the defendant agencies expressed no concerns about Holy Land's operations. At all times, Holy Land has offered to, and has been prepared to, make available every aspect of its operations for review by the defendant agencies.

17. On September 23, 2001, in response to the tragic events of September 11, President George W. Bush issued Executive Order 13224. The Executive Order purports to rest in part on the President's authority under the IEEPA. The Order blocked the United States assets of certain "foreign persons." In addition, the Order delegated to the Secretaries of State and Treasury and to the Attorney General the authority to designate certain other persons whose assets would be blocked, including:

> (c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order. . . .
>
> (d) [with exceptions not relevant here] and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General;
>
> (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex

> to this order or determined to be subject to this order; or
>
> (ii) to be otherwise associated with those persons listed in the Annex to this order or those persons determined to be subject to [other subsections] of this order.

18. On information and belief, on or about October 31, 2001, defendants designated Hamas as an SDGT, thus making Hamas subject to Executive Order 13224. President Bill Clinton had previously designated Hamas as an SDT on January 23, 1995 in Executive Order 12947. Secretary of State Madeleine K. Albright designated Hamas as an FTO on October 8, 1997. On information and belief, before President Clinton issued Executive Order 12947, no officer or agency of the United States government had designated Hamas as an FTO, SDT, or an SDGT, and no United States law prohibited United States persons from associating with or providing support to Hamas.

19. On or about December 3, 2001, under the purported authority of Executive Order 13224, Executive Order 12947, and the IEEPA, defendants designated Holy Land as an SDT and an SDGT. On December 4, 2001, pursuant to this designation, OFAC issued a blocking notice with respect to Holy Land's assets.

20. On December 4, 2001, under the purported authority of the OFAC blocking notice, representatives of the DOT and the FBI seized Holy Land's assets, including its bank accounts and all of its physical assets. Although Holy Land's then-counsel asked the DOT and FBI representatives to delay the seizures until counsel could apply for relief from a court, the representatives did not honor that request. The OFAC blocking notice provides in part:

> [A]ll real and personal property of Holy Land, including but not limited to all offices, furnishings, equipment and vehicles, as well as all funds and accounts in which Holy Land has any interest, are blocked. All assets of Holy Land, including but not limited to bank, charge and investment accounts, securities, and safe deposit boxes at any financial institution located in the United States or organized under the laws of the United States, including their overseas branches, are blocked. Blocked property may not be transferred, withdrawn, exported, paid, or otherwise dealt in without prior authorization from OFAC.
>
> All transactions involving property in which Holy Land has any interest, including any property of third parties in the possession or control of Holy Land, are prohibited without specific authorization from OFAC. As a consequence of this action, activities in, use of, and occupation of Holy Land offices, including [the Richardson] facility and each Holy Land office subject to United States jurisdiction, are hereby prohibited. . . . No property may be removed from the premises other than property that is clearly the personal property of the individual requesting to remove the property from the premises.

The blocking notice adds that any willful violation of the notice is punishable by criminal and civil penalties.

21. Among other actions, on December 4, 2001, representatives of the DOT and the FBI seized and removed from the Holy Land headquarters in Richardson, Texas all documents, computers, furniture, audiovisual equipment, and other items. The seized items remain in the custody of representatives of the defendant agencies. In addition, representatives of the DOT and the FBI closed

Holy Land's offices in Illinois, California, and New Jersey, seizing all items from the Illinois and California offices and a number of items from the New Jersey office.

22. Also on December 4, 2001, defendants seized Holy Land's bank accounts and funds in the United States. At the time of the seizures, those accounts contained millions of dollars that Muslims throughout the United States, including many Muslim citizens of this country, had contributed for charitable purposes in the exercise of their religion. Because the seizures occurred during the holy month of Ramadan, religious contributions to Holy Land had been particularly heavy in the period immediately preceding the seizures.

23. The funds seized on December 4, 2001 included funds in the client trust account of a law firm representing Holy Land in an unrelated matter. That trust account is located in the District of Columbia.

24. The seizures of Holy Land assets described in the preceding paragraphs occurred solely under the purported authority of the OFAC blocking notice. Defendants did not obtain a judicial warrant before seizing Holy Land assets. No court approved the seizures in advance.

25. Defendants did not provide Holy Land with notice of their intent to seize Holy Land's assets before the seizures occurred. Defendants did not provide Holy Land with an opportunity to be heard before the seizures occurred. Defendants did not provide Holy Land with a prompt, adversarial post-seizure hearing at which Holy Land would have a meaningful opportunity to contest the legal and factual basis for the seizures.

26. Defendants did not provide Holy Land with notice of their intent to designate Holy Land as an SDT and an SDGT before the designation occurred. Defendants did not provide Holy Land with a prompt, adversarial post-designation hearing at which Holy Land would have a meaningful opportunity to contest the legal and factual basis for the designation.

27. The designation of Holy Land as an SDT and an SDGT under Executive Orders 12947 and 13224 was based on information set forth in a memorandum dated November 5, 2001 from Dale L. Watson, Assistant Director of the Counterterrorism Division of the FBI, to R. Richard Newcomb, Director of OFAC ("the Watson memorandum"), together with several hundred pages of underlying exhibits. The Watson memorandum asserts that "[Holy Land] is the primary fund-raising entity for HAMAS and that a significant portion of the funds raised by [Holy Land] are clearly being used by the HAMAS organization." The purported "evidence" set forth in the Watson memorandum and the supporting exhibits either is false or, if true, does not support this assertion.

28. The Watson memorandum contains numerous factual errors, draws numerous unwarranted inferences, and relies upon obviously untrustworthy evidence. Among the memorandum's flaws are the following:

A. The Watson memorandum relies in part on alleged meetings, conversations, statements, and transactions that occurred before January 23, 1995, the date on which President Clinton first designated Hamas as an SDT. At the time of the alleged meetings, conversations, statements, and transactions, the conduct at issue, if it occurred, was entirely lawful.

B. The Watson memorandum relies in part on so-called "interviews" of alleged Hamas members and other Palestinians conducted by the GOI and the Israeli Police ("IP"). On information and belief, these "interviews" involved physical and psychological torture and other forms of extreme physical and psychological coercion and are unreliable for that reason. On information and belief, defendants knew as of December 4, 2001 that the GOI/IP "interviews" of alleged Hamas members and other Palestinians on which the Watson memorandum relies involved physical and psychological torture and other forms of extreme physical and psychological coercion.

C. The Watson memorandum relies in part on information allegedly provided by the GOI, without stating the basis, source, or reliability of that information. In light of the GOI's stated desire to eliminate Holy Land and the GOI's questionable means of gathering information, including torture, this information cannot be considered reliable. On information and belief, defendants knew as of December 4, 2001 that the information provided by the GOI could not be considered reliable for these and other reasons.

D. The Watson memorandum purports to rely in part on documents allegedly seized by the GOI during a search of an alleged Holy Land office in Jerusalem on May 7, 1995. On information and belief, the GOI deliberately provided only a portion of the seized documents to defendants, and prepared misleading analyses of other documents, to produce a false picture of Holy Land's operations. On information and belief, as of December 4, 2001 defendants knew that the GOI deliberately provided only a portion of the seized documents to defendants, and

prepared misleading analyses of other documents, to produce a false picture of Holy Land's operations.

E. The Watson memorandum relies in part on unnamed FBI informants. As to one such unnamed informant, the memorandum states that he has provided "both reliable and unreliable information in the past." As to the other such unnamed informants, the Watson memorandum asserts that they "have been found to be reliable in the past," without providing any factual basis from which to assess that assertion. On information and belief, the information allegedly provided by the informants is false and/or misleading.

F. The Watson memorandum relies in part on hearsay statements (often involving multiple levels of hearsay), from newspapers, magazines, books, and other secondary sources. On information and belief, this multiple hearsay is in many instances inaccurate and unreliable.

G. The Watson memorandum relies in part on so-called "FBI analysis," without indicating the factual basis or rationale underlying the "analysis." On information and belief, the FBI analysis on which the Watson memorandum relies is erroneous and inaccurate.

H. The Watson memorandum relies in part on alleged statements made under GOI interrogation by Muhammad Anati, the former head of Holy Land's Jerusalem office. The memorandum attaches, as Exhibit 50, the original GOI interrogation report, in Hebrew, that allegedly contains these statements. The attached GOI interrogation report does not contain any of the statements that the Watson memorandum attributed to Anati and in fact

contains statements tending to disprove any connection between Holy Land and Hamas.

I. The Watson memorandum attaches as Exhibit 102 and relies on a false and misleading translation of a statement given by Jamil Sarsour to the IP under interrogation in 1998. On information and belief, the Watson memorandum relies on other false and misleading translations into English of statements originally made in Arabic or Hebrew.

29. Holy Land filed its initial complaint in this matter on March 8, 2002 and its motion for preliminary injunction on April 5. The complaint and motion for preliminary injunction point out a number of respects in which the Watson memorandum and its underlying exhibits contain false information and draw inaccurate or unwarranted conclusions, including many of the respects set forth in paragraph 28 above.

30. At a status conference on April 22, 2002, the Court gave defendants until May 31 to respond to Holy Land's motion for preliminary injunction. On April 30, OFAC sent Holy Land a letter, together with hundreds of pages of additional material, proposing to redesignate Holy Land as an SDT and an SDGT and granting the Foundation two weeks to respond. The additional materials included (among other things) two FBI memoranda, purporting to supplement the Watson memorandum; a GOI "summary" of Anati's statements under interrogation, intended to replace Exhibit 50 to the Watson memorandum; and a binder found in Holy Land's files titled "Orphans Sponsorship Program, Gaza in July 1999." The binder lists the cause of death for the fathers of a number of the orphans as "martyr." Based on this description, an

FBI memorandum implies that these fathers had some connection with terrorism.

31. On May 14, 2002, Holy Land responded to the proposed redesignation. The Foundation stated in part:

> [T]he amount of time allotted for Holy Land's response is inadequate. Your April 30 letter included hundreds of pages of additional material on which OFAC proposes to rely. In light of the difficulty in obtaining information from the Middle East and the recent unavailability of certain former Holy Land personnel, we cannot adequately address that material by May 15. We request that OFAC give Holy Land an additional thirty days – through June 14, 2002 – in which to respond to the proposed redesignation.

Holy Land objected to certain materials on which OFAC proposed to rely in making the redesignation, including, for example, the GOI "summary" of Anati's statements and other GOI documents that were, on their face, incomplete. In addition, referring to the 1999 Gaza orphans book, Holy Land stated: "Although we have not had time to investigate in detail the circumstances of the 'martyrs' deaths, we have reason to believe that at least some of them may have been killed for collaborating with the GOI, others died accidentally, and still others were killed by the Israeli army in circumstances unrelated to terrorism. As far as we know at this point,, none of the fathers died in a suicide bombing." The Foundation "reiterate[d] that with adequate time, we can respond more concretely to the new information that you provided to us with your April 30, 2002 letter."

32. OFAC denied Holy Land's request for an extension unless the Foundation would agree to a corresponding

delay in the due date for the defendants' opposition to Holy Land's motion for preliminary injunction. Holy Land rejected the proposed link between the OFAC redesignation process and the defendants' briefing schedule because of the additional harm that a delay would cause to Holy Land, its employees, its donors, and its beneficiaries.

33. OFAC imposed the May 15 deadline for Holy Land to respond to the proposed redesignation because the defendants wanted to use the redesignation to their advantage in their brief due May 31. Had the defendants not insisted on having the redesignation decision available for their May 31 brief, OFAC could have granted Holy Land the requested extension without any prejudice to the government.

34. On May 31, 2002, OFAC redesignated Holy Land an SDT and an SDGT. The redesignation included a notice that the blocking order in effect against Holy Land's assets would be continued.

35. In redesignating Holy Land as an SDT and an SDGT, OFAC continued to rely on the Watson memorandum, without considering or addressing the flaws in the memorandum and is underlying exhibits, including the flaws set forth above and in Holy Land's memorandum in support of its motion for a preliminary injunction. The OFAC redesignation decision relied in part on the GOI "summary" of Anati's statements, without considering the actual content of the underlying statements and without considering or addressing Holy Land's objections to the use of the summary. The redesignation decision also relied on GOI documents that contain false and misleading information and that omit exhibits essential to a determination of their accuracy.

36. The "evidentiary memorandum" accompanying the redesignation asserts that OFAC "considered" Holy Land's response and its motion for preliminary injunction, but the memorandum gives no weight to any of Holy Land's evidence or arguments and provides no reasoned basis for rejecting them.

37. The "evidentiary memorandum" provided to Holy Land and placed in the administrative record has a number of paragraphs redacted. On information and belief, those paragraphs include information that the head of OFAC has determined to be classified.

38. On May 31, 2002, the same day as the redesignation, the defendants filed their brief in opposition to Holy Land's motion for preliminary injunction, together with a motion to dismiss and for summary judgment. The defendants' pleadings filed May 31 rely on OFAC's redesignation of Holy Land, arguing, for example, that the redesignation (rather than the original designation) should serve as the focus of the Court's APA review and that it essentially mooted Holy Land's procedural due process claim.

39. On May 31, 2002, defendants filed with the Court a purported "administrative record" that they compiled. On information and belief, defendants omitted from the administrative record materials that OFAC considered, directly or indirectly, in making the designation, redesignation, and blocking decisions, including materials contrary to OFAC's position.

40. Between the receipt of the proposed redesignation from OFAC and the filing of Holy Land's reply memorandum in support of its motion for a preliminary injunction and opposition to defendants' motion to dismiss

and for summary judgment on June 17, 2002, the Foundation investigated the new material that OFAC provided with its April 30 redesignation letter. Holy Land focused in part on the GOI "summary" of Anati's statements. Based on translations of Anati's actual statements, obtained from the defendants and from Anati's counsel in Jerusalem, Holy Land determined that the GOI "summary" provides a false and misleading account of what Anati had said about Holy Land and Hamas. The "summary" attributes to Anati statements damaging to Holy Land that do not appear in the underlying statements; it omits statements that Anati made during the interrogations denying that Holy Land provided funds to Hamas and otherwise exculpating Holy Land; and it omits any mention of Anati's sworn testimony from his own trial, in which he repeatedly denies that Holy Land had any connection to Hamas.

41. The materials that Holy Land received from Anati's counsel included a decision of an Israeli military appellate court concerning Anati's request to be released from detention. The ruling, rendered in September 1998, assesses the evidence against Anati to that point. In part, the ruling quotes the determination of the Israeli military trial court that "[t]he evidentiary material in this matter . . . is scanty and not unequivocal. The material does not indicate a direct connection between [Holy Land], in Israel or outside Israel, and the Hamas, nor does it indicate specific support of the families of members of that organization." The ruling quotes the trial court's further comment that "[t]he considerable amount of evidence which was seized indicates that [Holy Land] dealt with applications for assistance by hundreds and thousands of families – of which a few dozen have been identified as families of detained or dead members of the Hamas." In addition, the

court noted that the Israeli military prosecutor "agrees that it is impossible to prove priority in the allocation of funds to the families of the Hamas members who had been hurt."

42. In addition to investigating the GOI Anati "summary," Holy Land investigated the 1999 Gaza orphans binder that OFAC had provided with the April 30 redesignation notice. The information in the binder appears four-to-a-page and includes 99 pages of forms in English and ten in Arabic. Holy Land did not translate the forms in Arabic. The forms in English show that of the 396 orphans identified, 71 were the sons or daughters of the men whose cause of death was listed as "martyr." The space for the cause of one father's death was left blank and the causes of death of the fathers of the remaining 324 orphans are listed for the most part as "accident" or "illness," while a few are listed as "killed" or "missing." Because a number of the orphans are siblings, there are a total of 46 "martyr" fathers on the list.

43. Soon after receiving the 1999 Gaza orphans binder from the OFAC, Holy Land, through counsel, contacted Holy Land's Gaza office manager, Mohammed Abumoharram, about the circumstances under which the "martyr" fathers had died. By May 14, the date of Holy Land's response to the proposed redesignation, Holy Land had received preliminary information from Abumoharram which cast doubt on the implication in the FBI memorandum that those fathers had been connected with terrorism. Holy Land provided that preliminary information to OFAC in its May 14 response. Defendants made no attempt to investigate this information before OFAC issued the May 31 redesignation decision.

44. Counsel for Holy Land asked Abumoharram to investigate the circumstances of the deaths of the 46 fathers listed as "martyr" and the one that was blank. The investigation shows that three of the fathers were all killed in an explosion in an apartment and that there is a suspicion that they were making a bomb. One father was killed by the Israeli army after he hit three Israeli civilians with his truck. Ten fathers were killed because they were thought to be spies for Israel. Seven fathers were killed during confrontations of some sort with the Israeli army, although some involved motor vehicle collisions. Five fathers appear to have been wanted by GOI and were killed by GOI at home or at work. Other fathers were killed during the intifada, killed in prison, killed during an armed robbery, killed by a stray bullet, killed by a heart attack, and killed by others for unknown causes or by unknown persons. The information supplied by Abumoharram indicates that of the 46 "martyr" fathers and the one with the cause of death blank, only about four or five fathers may have died while in the commission of, or preparing for, a terrorist act.

45. Holy Land attached portions of the translated Anati materials to its reply memorandum in support of its motion for preliminary injunction and its opposition to defendants' motion to dismiss and for summary judgment, filed June 17, 2002. The translated materials included a number of Anati's interrogation statements, his trial testimony, and the decision of the Israeli military court described above. Holy Land also attached the Abumoharram declaration concerning the 1999 Gaza orphans binder and a series of additional exhibits that established the falsity of key portions of the "evidentiary memorandum"

supporting the redesignation, the associated FBI memoranda, and the underlying exhibits.

46. On June 24, 2002, defendants filed a motion to strike from the record all of the exhibits to Holy Land's reply in support of its motion for preliminary injunction and opposition to defendants' motion to dismiss and for summary judgment. Defendants falsely suggested that Holy Land had deliberately withheld the exhibits from OFAC in advance of the redesignation decision. Defendants contended that in addressing Holy Land's claims, the Court could only consider the administrative record that OFAC had compiled and filed with the Court on May 31, 2002. The administrative record, as compiled by defendants and filed with the Court, does not include any of the exhibits to Holy Land's reply and opposition.

47. OFAC did not adequately explain its designation, redesignation, and blocking decisions in the administrative record. OFAC failed to consider factors that are relevant to its designation, redesignation, and blocking decisions. On information and belief, OFAC considered evidence in connection with the designation, redesignation, and blocking decisions that it failed to include in the administrative record that it filed with the Court. Evidence arising after OFAC's actions, including the evidence attached to Holy Land's reply in support of its motion for preliminary injunction and opposition to the defendants' motion to dismiss and for summary judgment, shows that the designation, redesignation, and blocking decisions were not correct. An unbiased, rational agency decisionmaker would want to consider that evidence in making any decision with the serious consequences of the decisions to designate and redesignate Holy Land an SDT and an SDGT and to seize its assets.

48. The designation, redesignation, and blocking actions were not the result of impartial, objective analysis by OFAC. Those actions resulted from sham proceedings with predetermined outcomes. OFAC and the defendants determined in advance of the decisions that, regardless of the evidence, OFAC would designate and redesignate Holy Land an SDT and an SDGT and block its assets. OFAC's decisions are the result of defendants' bias against Holy Land and defendants' bad faith.

49. OFAC used the following methodology in its designation, redesignation, and blocking decisions: it drew every inference against Holy Land, no matter how irrational, unsupported by the evidence, or outweighed by contrary evidence; it ignored evidence that directly undermines its conclusions; it refused, usually without explanation, to give any weight to evidence in the administrative record that favors Holy Land; and it sought to exclude from the administrative record and suppress evidence exposing the falsity of its ultimate conclusion that Holy Land acts for or on behalf of Hamas.

50. As a direct result of the designation and redesignation of Holy Land as an SDT and an SDGT and the seizures and the other restrictions set forth in the OFAC blocking notices, Holy Land cannot carry out its charitable, humanitarian, and religious activities in this country or abroad. As a consequence, orphans and other needy persons and entities have been left without food, medicine, and other necessary humanitarian aid, and Holy Land and its donors cannot use the seized funds to carry out their duty of zakat as mandated by the tenets of the Muslim religion.

COUNT ONE – PROCEDURAL DUE PROCESS
(All Defendants)

51. Paragraphs 1 through 50 above are incorporated in this count by reference.

52. By designating and redesignating Holy Land as an SDT and an SDGT and seizing Holy Land's assets, defendants deprived Holy Land of its tangible property. In addition, the designation and redesignation deprived Holy Land of its property and liberty interest in its reputation and thereby damaged its ability to raise funds in the future. The stigma from the designation and redesignation of Holy Land as a terrorist organization has had and will continue to have consequences to Holy Land, its employees, and its donors that far exceed the consequences that ordinarily accompany official determinations of misconduct. Those consequences have included and will include, for example, the destruction of Holy Land's good will and reputation in the Arab-American community and among other governmental and non-governmental charitable organizations with which Holy Land worked closely in the past.

53. By depriving Holy Land of its property and liberty without prior notice and an opportunity to be heard or present evidence before a neutral decisionmaker (in the case of the initial designation and blocking decisions), and without adequate notice and an adequate opportunity to be heard or present evidence before a neutral decisionmaker (in the case of the redesignation decision and blocking notice), defendants violated Holy Land's right to procedural due process under the Fifth Amendment to the United States Constitution.

54. By depriving Holy Land of its property and liberty without a prompt, adversarial post-deprivation hearing, at which Holy Land would have the right to test the evidence against it, defendants violated Holy Land's right to procedural due process under the Fifth Amendment to the United States Constitution.

55. By depriving Holy Land of its property and liberty on the basis of a deliberately skewed, one-sided, and incomplete administrative record, defendants violated Holy Land's right to procedural due process under the Fifth Amendment to the United States Constitution.

56. By depriving Holy Land of its property and liberty in part on the basis of purportedly classified information that Holy Land has no opportunity to contest, defendants violated Holy Land's right to procedural due process under the Fifth Amendment to the United States Constitution.

57. By depriving Holy Land of its property and liberty through sham designation, redesignation, and blocking decisions that in each case had a predetermined outcome adverse to Holy Land, and that were the product of the defendants' bias and bad faith, defendants violated Holy Land's right to procedural due process under the Fifth Amendment to the United States Constitution.

58. By depriving Holy Land of its property and liberty through the use of evidence that is false and unreliable, defendants violated Holy Land's right to procedural due process under the Fifth Amendment to the United States Constitution.

59. Defendants' violation of Holy Land's right to procedural due process under the Fifth Amendment to the

United States Constitution has harmed, and is continuing to harm, Holy Land.

COUNT TWO – SUBSTANTIVE DUE PROCESS
(All Defendants)

60. Paragraphs 1 through 59 are incorporated in this count by reference.

61. By designating and redesignating Holy Land as an SDT and an SDGT and seizing Holy Land's assets in the manner and through the procedures described above, defendants acted arbitrarily and capriciously and in a manner that shocks the conscience, in violation of Holy Land's right to substantive due process under the Fifth Amendment to the United States Constitution.

62. Defendants' violation of Holy Land's right to substantive due process under the Fifth Amendment to the United States Constitution has harmed, and is continuing to harm, Holy Land.

COUNT THREE – FIFTH AMENDMENT TAKINGS CLAUSE
(All Defendants)

63. Paragraphs 1 through 62 are incorporated in this count by reference.

64. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets constitute takings of Holy Land's property without just compensation, in violation of the takings clause of the Fifth Amendment to the United States Constitution.

65. Defendants' violation of Holy Land's rights under the Fifth Amendment takings clause has harmed, and is continuing to harm, Holy Land.

COUNT FOUR – FOURTH AMENDMENT
(Defendants Ashcroft, DOJ, O'Neill, and DOT)

66. Paragraphs 1 through 65 are incorporated in this count by reference.

67. Defendants Ashcroft, DOJ, O'Neill, and DOT, through their agents, searched Holy Land's premises and seized Holy Land's assets without a warrant and without the required level of individualized suspicion, in violation of the Fourth Amendment to the United States Constitution.

68. Defendants' searches of Holy Land's premises and seizures of Holy Land's assets were unreasonable, in violation to the Fourth Amendment to the United States Constitution.

69. Defendants' violation of Holy Land's Fourth Amendment rights has harmed, and is continuing to harm, Holy Land.

COUNT FIVE – FIRST AMENDMENT FREEDOM OF SPEECH AND ASSOCIATION
(All Defendants)

70. Paragraphs 1 through 69 are incorporated in this count by reference.

71. Holy Land does not have a knowing affiliation with Hamas or any other organization or person possessing unlawful aims and goals. Holy Land does not have a

specific intent to further the illegal aims of Hamas or any other organization or person possessing unlawful aims and goals.

72. By designating and redesignating Holy Land as an SDT and an SDGT and by seizing Holy Land's assets, defendants substantially interfered with the rights of Holy Land to freedom of speech and freedom of association under the First Amendment to the United States Constitution.

73. The substantial interference with the rights of Holy Land to freedom of speech and freedom of association does not serve a compelling governmental interest.

74. Designating and redesignating Holy Land as an SDT and an SDGT and seizing its assets is not the least restrictive means of accomplishing any compelling governmental interest.

75. Defendants' violation of Holy Land's First Amendment rights of freedom of speech and association has harmed, and is continuing to harm, Holy Land.

COUNT SIX – FIRST AMENDMENT FREE EXERCISE OF RELIGION (All Defendants)

76. Paragraphs 1 through 75 are incorporated in this count by reference.

77. Holy Land and its Muslim donors and employees support and participate in Holy Land's work because it fulfills their religious obligations as Muslims to engage in zakat (anonymous humanitarian charitable giving). Zakat is one of the Five Pillars (fundamental tenets) of the

Muslim religion. Holy Land conducts its charitable and humanitarian giving in accordance with, and as required by, the tenets of the Muslim religion.

78. By designating and redesignating Holy Land as an SDT and an SDGT and by seizing Holy Land's assets, defendants have substantially burdened the exercise of religion by Holy Land and its Muslim donors and employees.

79. The substantial burden that the designation and redesignation of Holy Land and the seizure of its assets has placed on the exercise of religion by Holy Land and its Muslim donors and employees does not further any compelling governmental interest.

80. The substantial burden that the designation and redesignation of Holy Land and the seizure of its assets has placed on the exercise of religion by Holy Land and its Muslim donors and employees is not the least restrictive means of furthering any compelling governmental interest.

81. Defendants' violation of Holy Land's First Amendment right to free exercise of religion has harmed, and is continuing to harm, Holy Land.

COUNT SEVEN – RELIGIOUS FREEDOM RESTORATION ACT, 42 U.S.C. §§ 2000bb to 2000bb-4 (All Defendants)

82. Paragraphs 1 through 81 are incorporated in this count by reference.

83. Muslim donors' and employees' contributions to Holy Land in accordance with the Muslim tenet of zakat, and Holy Land's use of those donations for charitable and humanitarian purposes in accordance with, and as required by, the tenets of the Muslim religion, constitute the "exercise of religion" under 42 U.S.C. §§ 2000bb-2(4), 2000cc-5.

84. By designating and redesignating Holy Land as an SDT and an SDGT and by seizing Holy Land's assets, defendants have substantially burdened the exercise of religion by Holy Land and its Muslim donors and employees.

85. The substantial burden that the designation and redesignation of Holy Land and the seizure of its assets has placed on the exercise of religion by Holy Land and its Muslim donors and employees does not further any compelling governmental interest.

86. The substantial burden that the designation and redesignation of Holy Land and the seizure of its assets has placed on the exercise of religion by Holy Land and its Muslim donors and employees is not the least restrictive means of furthering any compelling governmental interest.

87. Defendants' violation of Holy Land's rights under the Religious Freedom Restoration Act has harmed, and is continuing to harm, Holy Land.

COUNT EIGHT – FIFTH AMENDMENT EQUAL PROTECTION
(All Defendants)

88. Paragraphs 1 through 87 are incorporated in this count by reference.

89. Defendants designated and redesignated Holy Land an SDT and an SDGT and seized its assets in significant part because Holy Land has contributed funds to and through certain persons and entities in Palestine that the GOI claims are Hamas related, including, among others, the Palestinians that the GOI deported to southern Lebanon in December 1992; certain Zakat committees; the Al-Razi Hospital; and the Dar Al Salam Hospital.

90. Non-Muslim United States non-governmental organizations contribute or have contributed funds to and through these same persons and entities without being designated SDTs or SDGTs or suffering any other adverse action from defendants.

91. Defendants have intentionally discriminated against Holy Land at least in part because it is a Muslim organization, in violation of the equal protection component of the Fifth Amendment Due Process Clause.

92. Defendants' intentional discrimination against Holy Land on the basis of its religious orientation does not further any compelling governmental interest.

93. Defendants' intentional discrimination against Holy Land on the basis of its religious orientation is not the least restrictive means of furthering any compelling governmental interest.

94. Defendants' violation of Holy Land's rights under the equal protection component of the Fifth Amendment Due Process Clause has harmed, and is continuing to harm, Holy Land.

COUNT NINE – ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 701-706
(All Defendants)

95. Paragraphs 1 through 94 are incorporated in this count by reference.

96. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets constitute "final agency action" under 5 U.S.C. § 704.

97. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

98. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets are contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

99. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets are in excess of their statutory authority under the IEEPA, *see* 5 U.S.C. § 706(2)(C), because (a) no foreign country or any national thereof has any interest in the blocked assets, 50 U.S.C. § 1702(a)(1)(B), with the exception of approximately $225,000 owed to foreign vendors, for services and supplies provided to Holy Land

for humanitarian use before the blocking notice was issued on December 4, 2001, and (b) 50 U.S.C. § 1702(b)(2) excludes from the executive's power under IEEPA "the authority to regulate or prohibit, directly or indirectly . . . donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering."

100. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets were done without observance of procedure established by law. 5 U.S.C. § 706(2)(D).

101. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets are unwarranted by the facts. 5 U.S.C. § 706(2)(F). Those agency actions are adjudicatory in nature, and the factfinding procedures that defendants employed were inadequate.

102. Defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets were made without regard to the right of Holy Land, its donors, and its employees to the free exercise of religion and to speak and associate freely. Given that the designation, redesignation, and seizures directly interfere with the exercise of fundamental, constitutionally-protected rights by Holy Land, its employees, and its donors, the defendants should have applied, but did not apply, a heightened standard of proof in reaching their decisions. In addition, in making their decisions, the defendants should have satisfied themselves and a neutral decisionmaker, but did not satisfy themselves or a neutral decisionmaker, that the United States had a compelling interest in designating and redesignating Holy Land as an

SDT and SDGT and seizing its assets, and that the designation, redesignation, and seizures constituted the least restrictive means in serving any compelling interest.

WHEREFORE, Holy Land requests that the Court grant the following relief:

A. A declaration under 28 U.S.C. § 2201 that defendants' designation and redesignation of Holy Land as an SDT and an SDGT and their seizures of Holy Land's assets violated Holy Land's rights under the First, Fourth, and Fifth Amendments, RFRA, the IEEPA, and the APA, and the rights of Holy Land's Muslim donors and employees under the First Amendment and RFRA.

B. An injunction restraining defendants from, continuing to block or otherwise interfere with Holy Land's access to and disposition of its assets.

C. Payment of Holy Land's attorney's fees and expenses incurred in this matter under 28 U.S.C. § 2412 and any other applicable provision of law.

D. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

FREEDMAN BOYD DANIELS
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2002, a copy of the foregoing was served by hand-delivery upon:

Sandra Schraibman, Esquire
Elizabeth J. Shapiro, Esquire
Susan Demske
United States Department of Justice
901 E. Street, N.W., Room 988
Washington, D.C. 20004

/s/ John Cline
John D. Cline